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CASES AND OPINIONS

ON

INTERNATIONAL LAW.

CASES AND OPINIONS

ON

INTERNATIONAL LAW,

AND VARIOUS POINTS OF ENGLISH LAW
CONNECTED THEREWITH.

COLLECTED AND DIGESTED FROM

ENGLISH AND FOREIGN REPORTS,
OFFICIAL DOCUMENTS, AND
OTHER SOURCES.

WITH

NOTES CONTAINING THE VIEWS OF THE TEXT-WRITERS
ON THE TOPICS REFERRED TO, SUPPLEMENTARY
CASES, TREATIES, AND STATUTES.

PART II. WAR.

PART III. NEUTRALITY.

BY

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PREFACE.

The publication of the present volume has been greatly delayed owing to the uncertainty that prevailed with respect to the ratification by Great Britain of the Declaration of London and the International Prize Court Convention. For if it had been found practicable, having regard to the larger national interests involved, to accept those Conventions and to effect the necessary changes in the domestic law, one of the results would certainly have been to free the law on many of the topics included in this volume, of much of its present complexity and uncertainty. But inasmuch as there appeared to be no prospect of an immediate settlement of this question, and in view, too, of the probability that the rules embodied in the Declaration of London will in any case have to be taken count of in the naval wars of the future (*a*), it was thought advisable to proceed to publication without further delay, even at the cost of presenting the subject-matter, at many points, in a form far less concise and in terms less conclusive than might otherwise have been possible.

The systematic notes—which, with the Excursus, practically form a connected treatise, after the example of Volume I.—have necessarily been retained in the present volume. These, as has already been pointed out, were rendered necessary by certain fundamental changes—necessitating, indeed, a complete revision of many of the previous conceptions—that had taken place in the international system in the period immediately preceding the publication of the first volume, which were at the time very inadequately reflected in the current text-books, or the editions then available. This method of treatment involved, no doubt, a departure from the

(*a*) As to the reasons for this view, see *infra*, pp. 285, 387.

original purpose and scope of the work: but it was thought, nevertheless, to be admissible as a temporary expedient designed to meet an exceptional situation.

It is in relation to matters dealt with in the present volume that convention has made its greatest inroad on the customary law. The effect of this has been to displace or weaken the authority of many of the earlier cases, and to render it necessary or desirable to replace these often by cases and controversies which have not been the subject of judicial or, indeed, of any definitive settlement. Nevertheless, even such cases possess a certain value, either as showing the trend of modern practice, or as revealing new situations or problems and suggesting—or at any rate eliciting a careful consideration of—the principles appropriate to their solution.

The subject of Maritime International Law has been dealt with in some detail. A translation of the text of such of the Hague Conventions as touch on subjects dealt with in the present volume, as well as of the Declaration of London, has been included in the Appendix; where, too, will be found a Table of Ratifications and Adhesions, which carries these down to the latest practicable date.

The author's thanks are due to Mr. J. J. Quinn, B.A., LL.B., of the Parliamentary Library, Sydney, for his friendly services in reading the proofs and preparing an Index.

P. C.

"Hollebrook," Hobart, Tasmania.
January, 1913.

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LIST OF THE PRINCIPAL WORKS REFERRED TO, OTHER THAN REPORTS AND OFFICIAL DOCUMENTS.

"American and English Encyclopædia of Law" (2nd ed.).

Anson, Sir W. R.: "Law and Custom of the Constitution" (1907 and 1908).

Annuaire de l'Institut de Droit International.

Asakawa, K.: "The Russo-Japanese Conflict—its Causes and Issues" (1904).

Atherley-Jones, L. A.: "Commerce in War" (1907).

Barclay, T.: "Problems of International Law and Diplomacy" (1907).

— : "The Turco-Italian War" (1907).

Baty, Th.: "International Law in South Africa" (1900).

—— "International Law" (1909).

Beak, G. B.: "The Aftermath of War" (1906).

Bernard, M.: "British Neutrality during the American Civil War" (1870).

Bentwich, N.: "The Declaration of London" (1911).

Blackstone: "Commentaries" (4th ed.).

Bluntschli, J. C.: "Das Moderne Völkerrecht der Civilisirten Staaten" (1878).

Bordwell, P.: "The Law of War" (1908).

Broom, H.: "Constitutional Law" (1885).

Calvo, C.: "Le Droit International" (1887).

Coke, E.: "Commentary upon Littleton."

Cowen, T.: "Russo-Japanese War."

Dalloz, V. A. D.: "Jurisprudence Générale."

Dicey, A. V.: "Conflict of Laws," 2nd ed. (1908).

—— "Law of the Constitution," 7th ed. (1908).

Grotius, "De Jure Belli ac Pacis."

Hall, W. E.: "A Treatise on International Law" (1909).

Halleck: "International Law," English edition by Sir Sherston Baker (1893).

Heffter, A. W.: "Das Europäische Völkerrecht der Gegenwart" (1883).

Hershey, A. S.: "The International Law and Diplomacy of the Russo-Japanese War" (1906).

Higgins, A. P.: "The Hague Peace Conferences and other International Conferences" (1909).

Historicus, "Letters on some Questions of International Law" (1863).

Holland, T. E.: "The Elements of Jurisprudence" (1910).

"Laws of War on Land" (1908).

"Letters upon War and Neutrality."

"Manual of Naval Prize Law."

—— "Studies in International Law" (1898).

HUBER, "Die Staaten-Succession" (1898).
HÜBNER, MARTEN VON: "De la Saisie des Bâtiments Neutres" (1778).
"International Law Situations of the U. S. Naval College for 1904."
JOMINI, H.: "Précis de l'Art de la Guerre" 1836.
Journal of the Society of Comparative Legislation (New Series).
KENT, J.: "Commentaries on American Law" (1873).
LATIFI, A.: "Effects of War on Property" (1909).
LAWRENCE, T. J.: "Essays on some disputed questions of Modern International Law" (1885).
—— "Principles of International Law" (1900).
—— "War and Neutrality in the Far East" (1901).
LINDLEY, W. B.: "Company Law" (1902).
MANNING, W. O.: "Commentaries on the Law of Nations" (1875).
"Manual of Military Law" (War Office, 1907).
MARTENS, Baron CH. DE: "Causes Célèbres du Droit des Gens" (1858—1861).
MAURICE: "Hostilities without Declaration of War" (1883).
MERLIN: "Répertoire Universel de Jurisprudence" (1828).
MOORE, J. B.: "Extradition" (1891).
—— "History and Digest of International Arbitrations" (1895).
—— "A Digest of International Law" (1906).
NYS, E.: "Le Droit International" (1904—1906).
"Official History of the Russo-Japanese War," 2nd ed. (1909).
OPPENHEIM, L.: "A Treatise on International Law" (1912).
ORTOLAN, J. L. E.: "Règles Internationales et Diplomatie de la Mer" (1864).
PHILLIMORE, Sir R.: "Commentaries upon International Law" (1889).
PHILLIPSON, C.: "Effect of War on Contracts" (1909).
"Studies in International Law" (1889).
PISTOYE et DUVERDY: "Traité des Prises Maritimes" 1859.
ROUSSEAU, J. J.: "Du Contrat Social."
SCOTT, J. B.: "Cases on International Law" (1902).
SMITH, F. E., and SIBLEY, N. W.: "International Law as interpreted during the Russo-Japanese War" (1905).
STEPHEN, H. J.: "Commentaries on the Law of England" (1903).
TAKAHASHI, S.: "International Law applied to the Russo-Japanese War" 1908.
TAYLOR, H.: "Treatise on International Law" (1901).
TUDOR, O. D.: "A Selection of Leading Cases on Mercantile and Maritime Law." 3rd ed. (1884).
TWISS, Sir T.: "The Law of Nations," 2 vols., 2nd ed. 1884—1887).
VATTEL: "Le Droit des Gens."
WESTLAKE, J.: "International Law," Part I., Peace (1904); Part II., War 1907.
WHARTON, F.: "Digest of the International Law of the United States" (1887).
WHEATON, H.: "International Law." Edition by Boyd, A. C. 1889. Edition by Dana, R. H. 1866).
WILLIAMS, Sir E. V.: "Law of Executors and Administrators" (6th ed.).
WOOLSEY, T. D.: "Introduction to the Study of International Law" (1888).

Note.—In cases where only one work of an author is referred to the work is usually cited by the name of the author only. Numbers refer to pages unless otherwise indicated.

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CASES AND OPINIONS

ON

INTERNATIONAL LAW.

PART II.—WAR.

THE COMMENCEMENT OF WAR.

I. THE QUESTION OF PRIOR NOTICE OR DECLARATION.

CONTROVERSY BETWEEN RUSSIA AND JAPAN, 1904.

called lease both of Port Arthur and Talienwan [b]. In 1900 she had also established herself in the Chinese province of Manchuria, from which, notwithstanding repeated promises, she refused to withdraw; whilst more recently, she had attempted to acquire a foothold in Korea, and now threatened to dominate the northern parts of that country. For these reasons, the relations between the two Powers at the date mentioned were seriously strained. In July, 1903, Japan, with the object of relieving this tension, opened negotiations with Russia on the subject of the situation in Manchuria and Korea. On the 12th August Japan accordingly submitted certain proposals, which involved in substance a mutual engagement to respect the independence and territorial integrity both of China and Korea; the maintenance of the principle of equal opportunity for the commerce and industry of all nations; and, subject thereto, a reciprocal recognition of Japan's preponderating interests in Korea, and of Russia's special interests in railway enterprises in Manchuria. On the 3rd October Russia submitted counter-proposals, which, in effect, limited the proposed engagement to Korea, and even then subject to certain new conditions, as that no part of that territory should be used for strategical purposes, and that a neutral zone should be established; whilst she further required that Japan should recognize Manchuria and its littoral as altogether outside her special sphere. Thereafter various other proposals and counter-proposals passed between the parties, although without any agreement being reached, and with such delay on the part of Russia as to create some doubt as to whether an arrangement was really desired by her. On the 13th January Japan made a fourth and final proposal, in which she offered to recognize Manchuria and its littoral as outside her sphere of interest, provided that Russia would undertake to respect the territorial integrity of China and Manchuria, to recognize all treaty rights in Manchuria, and to treat Korea and its littoral as outside her sphere of interest; rejecting, however, the Russian proposals as to the non-use of Korean territory for strategical purposes and the establishment of a neutral zone. Inasmuch as this represented the extreme limit to

[b] See vol. i. 110.

which Japan was prepared to go in the matter of concession, a prompt reply was asked for; but in spite of repeated efforts on the part of M. Kurino, the Japanese Minister at St. Petersburg, no reply was in fact received until the 7th February (*c*).

In the meantime, and whilst these negotiations were proceeding, both parties pressed on with their military and naval preparations. Russia, in particular, dispatched a naval squadron to the East under Admiral Wirenius—passed some 40,000 troops into Manchuria—and made preparations for sending 200,000 more. She also dispatched troops to the Korean frontier, and placed her forces on the Yalu on a war footing; whilst either on or before the 2nd February her troops are said to have crossed the Yalu, and to have entered Korea (*d*). The Russian fleet also appears to have sailed from Port Arthur on the 3rd February, and to have cruised off the Japanese coast. On the 1st February, moreover, the Russian authorities at Vladivostock appear to have warned the Japanese commercial agent there that, inasmuch as a state of siege might at any time be proclaimed, he should prepare his countrymen for withdrawal (*e*).

On the 5th February the Japanese Government, irritated by these delays and occurrences, determined to abandon any further negotiations, and also to sever its diplomatic relations with Russia. On the 6th February, at 2 p.m., this determination was communicated by the Japanese Foreign Office to the Russian Minister at Tokio. On the same day, at 4 p.m., M. Kurino, at St. Petersburg, handed two notes to the Russian Foreign Minister, Count Lamsdorff. In one of these M. Kurino announced that his Government proposed to abandon further negotiations; and that it would immediately consider what means of self-defence might be needed,

(*c*) This reply appears to have been dispatched on the 5th February, but was not received by Baron Rosen, the Russian Minister at Tokio, until the 7th. It would not in any case have prevented the war. It was, however, subsequently charged against the Japanese Government that the Russians had maliciously delayed the delivery of this despatch, in order to manufacture justification for a surprise of diplomatic relations on the ground of delay. This charge appears to have been unfounded, the delay having probably occurred at Port Arthur and not at Tokio: see Bordwell, 163 *et seq.* A translation of all these documents will be found in Asakawa, 303–339.

(*d*) See the *Times*, 26th March, 1904; the Official History, 1st ed. p. i. 42 (although this passage is omitted from the 2nd ed.).

(*e*) Takahashi, 12.

reserving its right to take "such independent action as it might consider best to consolidate and defend its menaced position, as well as to protect Japan's vested rights and legitimate interests" (*a*). In the other he announced a definite severance of diplomatic relations (*a*). The rupture of diplomatic relations with Russia was notified by Japan to other Powers on the 8th February. The Japanese Minister quitted St. Petersburg on the 16th February, leaving Japanese interests in charge of the United States ambassador; whilst the Russian Minister quitted Tokio on the 11th February, leaving Russian interests in charge of the French ambassador.

Meanwhile, on the morning of the 6th February, the Japanese fleet, acting under orders previously received, quitted Sasebo in company with a number of transports containing troops: one division of the fleet, under Admiral Togo, proceeding to Port Arthur, whilst the other, under Rear-Admiral Uriu, proceeded with the transports to the coast of Korea (*b*). On the same day the "Chemulpo" a vessel belonging to the Russian volunteer fleet [illegible] "Manchu" a vessel belonging to the Port Chitta Railway Co., were captured by Japanese cruisers (*c*). On the 9th February, shortly after midnight, an attack was made on the Russian vessels lying in the outer harbour of Port Arthur; while [illegible] the inner harbour [illegible]

Japanese subjects, was issued by Japan; whilst on the same day a similar declaration, in the form of a proclamation addressed to Russian subjects, was issued by Russia. Neither of these proclamations, it will be observed, constituted a declaration in the sense of a notice addressed to the other belligerent; and each sought to justify the action of the issuing Power and to impeach that of its adversary [1]. Nevertheless, their effect was speedily circulated, and served at once to warn neutral States of the outbreak of hostilities, and to bring under their notice the contentions of the respective parties.

The Controversy. The action of Japan in thus commencing hostilities, and her action in regard to Korea, were now made the subject of a formal indictment on the part of Russia; and in the controversy which ensued each party sought to justify its action at the bar of international opinion. By a manifesto issued on the 18th February, 1904, Russia accused Japan of having suddenly broken off negotiations for the purpose of achieving "a slight success in the long-desired war by a treacherous attack" [2]. To this charge Japan replied on the 22nd February, alleging, in effect, that Russia had, throughout the whole course of the negotiations, shown that she was herself intent on war; that she had been guilty of wanton delays; and that she had utilized those delays for the purpose of strengthening her military and naval position; a quantity of evidence being adduced in proof of these statements. Hence it was contended that the hostile measures adopted by Japan were in effect only measures of self-defence. It was further pointed out that as early as the 6th February, Japan had intimated to Russia that she reserved her right to take such independent action as might be necessary in defence of her menaced position—an intimation which clearly covered the possible adoption of hostile measures. Finally, it was contended that, according to the then usage of nations, a prior declaration of war was by no means an indispensable condition to the opening

[1] The text of both declarations will be found in Parl. Papers, Russia, No. 1 (1904), Cd. 1789, pp. 3, 4; and in Martens, Nouveau Recueil, 3rd Ser. t. i. pp. 345–348. See also Takahashi, Int. Law, pp. 345–348.

[2] A more detailed accusation was published on the 20th February in the *Official Messenger*. See *Times*, 22nd February, 1904.

of hostilities (*n*). This reply was made public through the press on the 3rd March (*o*).

Although this controversy is not one that admitted of any judicial or definitive settlement, it serves, perhaps for that very reason, to illustrate generally the position occupied by the law of war in the international system. Some part of the controversy, it will be seen, turned on the question of the justice or injustice of the war; but with this question international law does not, so far, concern itself, merely taking notice of the existence of a state of war as the basis of a new set of relations which will then arise both as between the belligerent States themselves, and between each of them and neutral States. More particularly, it serves to illustrate the conditions under which hostilities might be commenced under the customary law; the date as from which the legal effects of war will accrue; and, finally, the question of the neutrality of territory belonging to a third Power, the control of which was one of the objects of the war, although the last of these questions is left over for later consideration (*p*).

The question whether Japan was justified in opening hostilities in the circumstances described, without a prior declaration of war, must be judged, of course, by the customary law of nations, and not by the present conventional rules (*q*). The views of the text writers on this subject differ greatly. Some insist on the necessity of a prior declaration, or, at any rate, of specific notice directly addressed by an intending belligerent to his foe; others, whilst requiring prior notice, yet regard a proclamation or manifesto—not necessarily addressed to the enemy State—as sufficient; whilst others again regard both declaration and notice as unnecessary, treating those usually issued in practice as intended for the information rather of subjects or neutrals than of the enemy (*r*). International practice on the subject has also varied. Down to the sixteenth century it appears to have been usual to notify an intended war by letters of defiance and later by heralds; but this practice naturally fell into disuse. As the result of an exhaustive inquiry, it has been found that from 1700 to 1870 there are only 10 instances in which war was preceded by a formal declaration; whilst there are no less than 107 instances in which it was commenced without declaration (*s*). In the later wars of the nineteenth century, indeed, we notice a tendency to revert to the earlier practice of issuing a formal declara-

(*n*) Takahashi, 10–12; Asakawa, 351—354.

(*o*) Asakawa, 351.

(*p*) The facts and issues in relation to the question of the violation of Korean neutrality are discussed at p. 274 *et seq.*

(*q*) The rules now embodied in the Hague Convention, No. 3 of 1907, are not declaratory of the customary law, but merely lay down a convenient practice for future observance.

(*r*) Hall, 370–378.

(*s*) Maurice, Hostilities without Declaration of War (1883), 4; *The Nineteenth Century*, lv, 676, April, 1904.

tion prior to the commencement of hostilities (*t*). But in 1904 the newer practice had certainly not reached a stage at which it could be said to have become obligatory or to have displaced what had been the predominant practice of States for nearly three centuries (*u*). Hence we may take it that under the customary law, as it obtained in 1904, there was no obligation on an intending belligerent to issue a formal declaration or notice to his foe before commencing hostilities; and that Japan therefore broke no law in commencing hostilities in the circumstances previously described. At the same time, the rule that war may legitimately be begun without prior declaration or notice, does not imply that either party would be justified in taking the other unawares. "An attack," says Professor Westlake, "which nothing had foreshadowed, would be infamous, and third Powers would probably join in resenting and opposing it" (*x*). Hence even under the customary law—which on this point still remains in force—no attack may lawfully be made unless friendly relations have been terminated in sufficient time, and under such circumstances, as to guard against all reasonable danger of surprise (*y*). But even so, it would still appear that the charge of surprise and treachery made against Japan was unfounded; for the reason that the war arose only after the failure of a long series of negotiations, that both parties had for some time past been hurrying on their preparations, and that both must have regarded an outbreak of war as probable, if not inevitable. On the 6th February, moreover, the Japanese Government, in severing diplomatic relations with Russia, had expressly reserved its right "to take such independent action as it might consider best to consolidate and defend its menaced position"; and this warning had been given some two days before the attack on Port Arthur, which, although not the starting-point of the war, constituted the chief factor in the Russian charge of treachery and surprise.

With respect to the actual date at which the war may be said to have commenced, a state of war will arise either upon a formal declaration of war, whether unilateral or bilateral; or by some act of force done by one party against the other with intent of war; or by some act of force done by one party, even without such intent, if the other elects to treat it as a cause of war (*z*). The question of war or no war is at bottom a question of fact, and if proved to

(*t*) So the Franco-German war of 1870 and the Russo-Turkish war of 1877 were each preceded by a formal declaration, although in the latter case the Russians appear to have crossed the Pruth before the declaration was issued; whilst the Spanish American war of 1898, and the South African war of 1899, were each preceded by an ultimatum which had the effect of a conditional declaration. But in the Chino-Japanese war, 1894, although a declaration of war was issued by each of the belligerents, hostilities really began some time before.

(*u*) For a review both of practice and opinion on this point prior to 1907, see Hall, 370 *et seqq.*; and as to the issue of manifestoes loosely spoken of as declarations of war, *ibid.* 377, and Taylor, 456; and as to notice of neutrals, p. 287, *infra*.

(*x*) Westlake, ii. 23.

(*y*) Hershey, 68.

(*z*) See p. 10, *infra*.

exist in fact, then the state or relation of war will arise with all its attendant consequences, no matter what irregularity or default on either side may have attended its commencement (*a*). Applying these principles to the case in hand, it seems clear that the mere severance of diplomatic relations by Japan on the 6th February did not in itself amount to war, for the reason that such a proceeding is frequently resorted to in times of tension or grave misunderstanding without intent of war, although such a practice is greatly to be deprecated (*b*). Nor again did the mere sailing of the Japanese fleet from Sasebo on the morning of the 6th February constitute war (*c*), even though there was now a clear intent to open hostilities, for the reason that a war *de facto* can only arise out of some direct act of force applied by one party to the other. Hence the actual commencement of the war would appear to date from the capture by the Japanese of the *Ekaterinoslav*, which occurred somewhat later on the same day (*d*). If this be so, then it is from this moment that the new relations inaugurated by war must be deemed to have accrued.

(ii) THE DATE AS FROM WHICH THE LEGAL EFFECTS OF WAR WILL ATTACH AS BETWEEN BELLIGERENTS.

THE "ELIZA ANN."

(1813; 1 Dods. 244.)

Case. Shortly before the outbreak of war between Great Britain and the United States, in 1812, the "Eliza Ann" and other vessels under the American flag were seized by the British in Hanoe Bay, under an order for the detention of American property which had been issued in anticipation of the war, and were sent in for adjudication. On the case coming on for hearing a claim for the release of the vessels and their cargoes was made by direction of the Swedish Minister, on the grounds that Hanoe Bay was Swedish territory; that Sweden was at the time

(*a*) Hall, 277.

(*b*) As to a proposal to fix on mutual abolition, see Barclay, Problems of Int. Law and Diplomacy, 58, 181.

(*c*) Although it was so treated in the Japanese Prize Court (Takahashi, 591).

(*d*) Takahashi, 22, 760.

neutral; and that the capture was therefore invalid. In the result this claim was rejected, and both ships and cargoes were condemned, on the ground that a state of war, with all its attendant consequences, legally existed at the time between Great Britain and Sweden.

Judgment. Sir W. Scott, in his judgment—after according the fullest recognition to the rule that acts of violence by either belligerent within neutral territory were forbidden unless by permission of and subject to the responsibility of the territorial Power—proceeded to deal with the question whether Sweden was at the time to be regarded as neutral. As to this, he pointed out that the conduct of Sweden towards Great Britain had for some time past been of an unfriendly character; that she had excluded British ships from her ports, and had adopted a course of policy imposed on her by France, the enemy of Great Britain, and that Great Britain had then occupied Hanoe, whereupon Sweden had issued a declaration of war. But inasmuch as this declaration was unilateral only, it had been contended on the part of the claimant that no state of war existed at the time between the two countries. It seemed, however, perfectly clear that it was not any the less a state of war on that account. For war might exist even without a declaration on either side; as had, indeed, been laid down by the text writers on the law of nations. A declaration of war by one country was not a mere challenge to be accepted or refused at pleasure by the other. On the contrary, it served to show the existence of actual hostilities on one side at least; and hence put the other party also into a state of war, even though he might think proper to act on the defensive only. The treaty by which the war was concluded also clearly showed the existence of an antecedent state of war. Whatever the reasons for the hostile declaration on the part of the Swedish Government, and whether due to fear of France or some other cause, the broad fact was that war existed.

In the second place, it did not appear that the place of capture was within Swedish territory, for Hanoe was at the time occupied by the British forces, and their possession was a hostile

possession and had not been disturbed. The claim therefore failed both in respect of the neutrality of Sweden and the neutrality of the place of capture.

The main question here was whether, at the time of the capture, Sweden could be said to be at war with Great Britain and the ordinary incidents of war to attach, having regard to the fact that the declaration of war was unilateral only. A similar question was raised at the Hague Conference of 1907, but appears to have been left unanswered (*a*). In the case of the *Eliza Ann* it was held that a declaration of war, even though unilateral, sufficed to establish a state of war between the parties, with all its attendant consequences, including the right of capturing enemy property within the territorial waters of either belligerent (*b*). And the reasoning adopted shows this to be equally applicable in a case where the war originates, not in a declaration, but in some act of force done by one party with intent of war, even though by the municipal law of either State some particular authority alone may have power to declare war beforehand; for, at bottom, war is a question of fact, and once it exists in fact then all its legal incidents will attach, irrespective of the legality of its commencement (*c*). Nor is this rule affected, in its results, and as between the belligerents themselves, by the provisions of the Hague Convention, No. 3 of 1907 (*d*). On the other hand, the mere imminence of war will not produce this result. So, in *Janson* v. *Driefontein Consolidated Gold Mines* (1902, A. C. 484), it was pointed out that "no amount of strained relations" could be said to establish a state of war so as to affect the subjects of either country in their commercial or other transactions: for the reason that the law recognized a state of peace and a state of war, but knew nothing of an intermediate state which was neither the one nor the other (*e*). Nevertheless, the mere imminence of war will justify some precaution or delay on the part of subjects of either of the Powers affected, and may thus indirectly affect their commercial relations. So, in the case of the *Teutonia* (1870, L. R. 4 P. C. 171), a Prussian vessel under an English charter had received orders to proceed with her cargo to Dunkirk, in France; on arriving off that port on the 16th July, 1870, the master received information that war had broken out between France and Prussia, although in fact war was not declared until the 19th July; he there-

(*a*) Higgins, 295.

(*b*) See also *The Prize Cases*, 2 Black, at 668; and, as to claims to subjects, *The Santissima Trinidad*, 7 Wheat. at 338.

(*c*) See *Jecker* v. *Montgomery*, 13 How. *Insurance Co.*, 51 Maine, 465; Scott, 470; and *The Nayade*, 1 C. Rob. at 253).

(*d*) As to the meaning of the expression "foreign State at war with any friendly State" contained in the Foreign Enlistment Act, 1870, s. 4, see *U. S.* v. *Peace*, W. N. 1899, 11.

(*e*) *Ante*, p. 18.

(*f*) At p. 493 *et seq.*

upon proceeded to Dover for enquiry, by which time war had actually broken out. In these circumstances it was held by the Privy Council that, although the ship could in fact have entered Dunkirk as required by the charterer on the 16th July, yet the taking of a reasonable time for enquiry was legitimate; and that, inasmuch as the subsequent outbreak of war had relieved the owners of the ship from the obligations of the charter in this regard, the consignees of the cargo were not entitled to damages for non-delivery at Dunkirk.

General Notes. *The Relation or State of War.*—International war is a contest, carried on by armed force, either between States, or between a State and some community or body which is treated as a State for the purpose of the conduct of hostilities. International war differs from other kinds of war in that it has the effect of setting up a new relation in law both as between the belligerents themselves and as between each of them and other States. As between the belligerents, the state of war, although a departure from normal relations, is, nevertheless, a state of regulated violence; in which the conduct of hostilities is governed by certain principles and rules, which rest in part on custom and in part on convention, and which are sanctioned in the last resort by the action of international society, however uncertain that may be in its operation (*g*). As between the belligerents and neutral States, the new relation is also governed—and here, perhaps, more effectually—by principles and rules which have a similar basis and an added sanction. But cases of purely civil strife, or hostilities carried on against filibusters or pirates, or contests with the barbarous or semi-barbarous communities not possessing the requisites of statehood (*h*), establish no such relation, and do not strictly involve an application of the rules that govern international war; even though humanity or regard for international opinion, or the fear of retaliation may dictate their observance (*i*). In cases of civil war, indeed, where the circumstances are such as to affect the interests of other States in a manner similar to international war, and where the war is waged on either side by a community or body having an organized government capable of carrying on war according to established rules, a recognition of belligerency is, as we have seen, usually accorded (*k*). And the assumption by a State, in its repression of armed rebellion, of rights as against other States and their subjects, which strictly belong only to a state of war, will have a similar effect (*l*). In such cases the war will rank

(*g*) See vol. i. 14.

(*h*) *Ib.* 48.

(*i*) As to their application in cases of "insurrection," "rebellion," and "civil war," under the United States system, see Moore, Digest, vii. 159; and, as to belligerent powers exercised in civil war, Wheaton (Dana), 374, n.

(*k*) See vol. i. 66.

(*l*) As to the assumption of a right by the legitimate government to close ports within its territory, which are

for external purposes as a war between States: even though its incidents in other respects may continue to be regulable by the domestic law. So, during the American civil war, belligerent rights were exercised both by the United States Government, and after its recognition by that of the Confederacy, over the subjects and property of other States, according to the accepted rules of war, while the former also treated the members of the armed forces of the Confederacy as qualified belligerents; although it refused to recognize, under the domestic law, either the existence of the Confederate Government or its final disappearance *m*. With the objects of war, whether immediate or ulterior, international law does not concern itself, nor does it now recognize any distinction between different forms of war *n*. A war may, however, be "limited" in localized as regards the area of hostilities, though this can only arise from policy or agreement and not as a matter of legal obligation. *o*. In the Turco-Italian war of 1911, Italy originally declared her intention not to land troops in any part of the Ottoman empire except Tripolitania and Cyrenaica and to confine even her naval operations to the protection of the expedition and to the Italian coasts and interests *p*; although this statement of intention was not, in the result, wholly adhered to *q*.

The Object of War in the International System. — Between States, as between individuals, some sanction, other than moral, is required for the suppression of wrongdoing. In both cases such a sanction was originally found in self-redress, which was in effect a form of war, either public or private. In the passing of private war, we noted, broadly, a stage of unregulated self-redress; a stage in which self-redress was subjected to rules as to the inception of war or to certain customary restrictions; and finally, a stage in which it was, save in very exceptional cases, replaced by the action of judicial redress, under which a remedy has to be sought at the hands of the Courts, whose decrees are enforced by the organized authority *r*. As regards public war, [illegible]

[illegible] Opinion, Jan. 15, 1870.

[illegible] Wall. 96 (1866); The Venice, 2 Wall. 258 (1864); Mrs. Alexander's Cotton, 2 Wall. 404 (1864); Hanger v. Abbott, 6 Wall. 532 (1867); The Peterhoff, 5 Wall. 28 (1866); The Gray Jacket, 5 Wall. 370 (1866); The Amy Warwick, 2 Sprague, 123 (1863); The Hiawatha, 2 Sprague, 187 (1863); The Circassian, 2 Wall. 135 (1864); The Dashing Sally, 2 Wall. 37 (1864); The Ouachita Cotton, 6 Wall. 521 (1867); The Adula, Blatchford's Prize Cases, 211; The Baigorry, 1 Wall. 474 (1863); The Science, Blatchford's Prize Cases, 226; The Hampton, Blatchford's Prize Cases, 233; The Alicia, 7 Wall. 571 (1868); The Lilla, 2 Black, 673 (1862); The Stephen Hart, Blatchford's Prize Cases, 191; The Admiral, 3 Wall. 603 (1865); The Sarah Starr, Blatchford's Prize Cases, 208; The Reform, Blatchford's Prize Cases, 217; The Ann Carver, Blatchford's Prize Cases, 221; The Prize Cases, 2 Black, 635 (1862

national society has only reached the second of these stages. International law has, as we have seen *(e)*, no machinery, either judicial or administrative, for compelling States at variance to submit their disputes to arbitration *(s)*, or even for giving effect to awards where arbitration has been resorted to. Hence war is still treated as an indispensable factor in international life, and as a permissible form of international action. By international agreement, indeed, it has been attempted both to minimize the occasions for resorting to war and to humanize its methods. But that international law still remains a *jus belli ac pacis*, as in Grotius' time, may be seen from the fact that no less than five out of the six Conventions framed by the first Hague Conference, and no less than twelve out of the fourteen framed by the second Hague Conference are intended to regulate war or the method of conducting it. And even though we may believe that the circumstances previously described *(t)* may serve to impose some additional restraint on wars in the future, it is manifest that for a long time to come military efficiency must continue to be the main condition of national security and a "balance of power" the best guarantee of the general peace. International law does not even attempt, except in a very general way, to determine at what stage a State may have recourse to war; for leaves it to each State to determine this question for itself; and, once the relation of war is established, it treats each belligerent as having equal rights, irrespective of the cause or justification of the war. Nevertheless, a stage has been reached at which it is attempted to impose certain rules on having recourse to war, as well as regulations on the methods of conducting it, with [illegible] efficacy in their relative values. The former consist [illegible] of the formal [illegible] rights and pledges embodied [illegible] the [illegible] Hague Conventions of 1907 [illegible] and the [illegible] general arbitration [illegible] international disputes established by the Hague Convention of 1907 [illegible] which have [illegible] ratified by practically [illegible] States. [illegible] these conventions [illegible] by most [illegible] and [illegible] the possibility [illegible] the [illegible] and that [illegible] of [illegible] obligations, this is at least [illegible] of the [illegible] to [illegible] of [illegible] rights [illegible] of [illegible] and risks [illegible]

and the consequent odium that attaches to a disturbance of the peace—that recourse to them will become more truly obligatory as time proceeds. The restrictions imposed by custom or convention on the methods of conducting war will be considered hereafter (*b*).

The Law of War.—An ideal code of war would need, amongst other things—(1) to define the just causes of war; (2) to affix penalties for unjust war; and (3) to regulate the inception, the conduct, and the termination of war, as well as its effect on the legal relations both of belligerents and neutrals. (1) With respect to the first of these subjects, international law does not even attempt to define the just causes of war (*c*). Some writers indeed purport to set forth the grounds on which war may justly be entered on (*d*); but such attempts have no direct value (*e*), both because the alleged causes of war are frequently not real causes (*f*), and also because the real causes of war are commonly either too complex to be brought within the range, or too overwhelming to be brought under the control of legal rules (*g*). Nevertheless, the Hague Convention, No. 3 of 1907 (*h*), requires that a declaration of war shall embody a statement of reasons for the war (*i*); with the object no doubt, of bringing both national and international opinion to bear on intending belligerents in restraint of unjust wars (*k*). (2) As to the affixing of penalties for unjust war, international law, apart from its inability to define or decide questions of justice or injustice in regard to war, has, as we have seen, no machinery for this purpose (*l*). (3) But, so far as relates to the actual conduct of war, the rules of international law are now both comprehensive and fairly uniform. As between the belligerents themselves, it prescribes rules as to the opening of hostilities, the qualifications of combatants, the means and instruments of war, the treatment of prisoners, the care of the sick and the wounded, the right and duties incident to military occupation, and the termination of war. And, if we take into account recent

(*b*) See p. 91, *infra*; and on the subject generally, Hall, pt. i. c. 3, and Westlake, ii. 3 *et seq.*

(*c*) Except, of course, in so far as this may be involved in the enunciation of international rights and duties.

(*d*) See Taylor, 451; Halleck, i. 489; Woolsey, 184.

(*e*) Although, if there were any general agreement, they might perhaps possess an indirect value, as aiding in the formation of enlightened and international opinion, and, in this way, imposing some internal and external check on wars that did not conform to their rules.

(*f*) Wars apparently offensive are sometimes necessary of self-protection: as where one Power is forced to strike in order to prevent a hostile Power from completing preparations that would ensure its overthrow.

(*g*) Hall, 61; Oppenheim, ii. 73 *et seq.*

(*h*) *Infra*, p. 18.

(*i*) In the case of a conditional declaration it appears to be assumed that the conditions themselves will adequately reveal the reasons for the war.

(*k*) The report, however, recognizes that the real reasons will often not be given; but apparently regards the obligation of making a formal statement of reasons, especially where such reasons are ill-founded or out of proportion to the gravity of the war, as likely to operate in restraint of hasty action: see Parl. Papers, Misc. No. 1, 1908, p. 121; Pearce Higgins, 264.

(*l*) *Supra*, p. 13.

Conventions (*m*), the same observation applies to the relations that arise between the belligerents on the one hand and neutral States and their subjects on the other (*n*).

War in its relation to Individuals: (i.) *The traditional View.* The extent to which war may affect individuals who are identified with either belligerent really depends on usage and convention, and not on legal theory. Nevertheless, before passing from the theoretical aspects of the law of war, we need to advert briefly to certain theories that have been formulated with respect to the position of the individual in a war between States. One of these, which may be said to represent the traditional view, finds its best expression (*o*) in an opinion of Vattel, which was recently quoted with approval in *Janson* v. *Driefontein Consolidated Mines* (1902, A. C. at 493): "*Quand le conducteur de l'état, le souverain, déclare la guerre à un autre souverain, on entend que la nation entière déclare la guerre à une autre nation. Car le souverain . . . agit au nom de la société entière, et les nations n'ont affaire les unes aux autres, qu'en corps dans leur qualité de nations. Ces deux nations sont donc ennemies; et tous les sujets de l'une sont ennemis de tous les sujets de l'autre*" (*p*). The same view is also reflected in the American decisions (*q*). This theory, whilst recognizing that war is primarily a relation between State and State, yet recognizes also that in this, as in other external relations, the individual is necessarily identified with his State, alike in interest and responsibility; and, hence, that when war breaks out between two States, the consequences of that relation are not confined to their Governments or armed forces, but extend also to their individual members; with the result that the subjects of each become the enemies of the other, even though the consequences of such enmity have now been relieved of much of their former severity (*r*). This view also accords with the existing practice in war; under which all persons resident in belligerent territory are subject not only to the risks incident to military operations (*s*), but also to contributions, requisitions, and collective penalties (*t*), as well as the suspension of their ordinary rights by military law, and the capture of their property on the sea (*u*). Nor is it in any way inconsistent with those mitigations in the conduct of war, under which individuals, as combatants, are spared all unnecessary suffering, and, as non-combatants, are spared both in person and property so far as the exigencies of war will permit, or with the

(*m*) Including the Declaration of London.

(*n*) *Infra*, p. 281.

(*o*) That is, if we make due allowance for the changes that have since taken place in the conception of sovereignty: as to which, see vol. i. 59, 78.

(*p*) See *Infra*, Pt. iii. c. 5, 70; and 71 L. J. K. B. 481, 862, where the passage in question is correctly given.

(*q*) See *The Baltia Estonia*, 176 U. S. 568; Scott, 621).

(*r*) Hall, 61; but see also Westlake, ii. 38.

(*s*) As in the case of bombardment, *Infra*, p. 99.

(*t*) *Infra*, p. 110 *et seq.*

(*u*) *Infra*, pp. 49, 59, 152.

possible extension of these mitigations in the future; for such alleviations are really changes in the incidents of the relation and not in the relation itself.

(ii.) *The newer View.* Another theory of war in its relation to the individual was propounded by Rousseau in his *Contrat Social*. Here it is said: "*La guerre n'est donc point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs*" (*x*). This theory was originally put forward only as a philosophical principle; and probably without any appreciation of the deductions now sought to be derived from it. It was, however, subsequently adopted in almost identical terms by the French Courts (*y*) as a legal doctrine; and has, in this character, since been widely accepted by a great number of European writers, by whom indeed it is often put forward as a fundamental principle of international law; although for the most part rejected by English and American jurists (*z*). Its effect, if applied in practice, would be to sever the individual from his State in all that pertains to war, except, in so far as he is engaged in its service or enrolled in its fighting forces; or, on a broader construction, except in so far as he contributes to the prosecution of the war (*a*). It would declare [illegible] on the one hand, from taking any active part therein, whether direct or indirect, under pain of being treated as a criminal, and would except him, on the other, from its injurious effects, whether as regards his person or property. Such a doctrine is, however, open to grave objection *de lege*, whether we regard it as purporting to state the law as it is or as it should be. As to the question of the existing law, it is of course inconsistent with every practical application which the individual has, on the one hand, actually received, or is now receiving, alike in the matter of person and property, from the operations of war, whilst he is, on the other, [illegible] to render [illegible] and, for modern civilisation, would be [illegible] resistance to the enemy (*b*). Nor is it even [illegible] should conform to this theory [illegible] from the responsibilities and [illegible] it [illegible] is manifestly impossible to [illegible] the [illegible] is [illegible] of its [illegible] [illegible] to the [illegible] of [illegible] the [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [

taken place in the usages of war be attributed to this theory, for that amelioration really began before it was formulated, and has since extended equally to combatants and non-combatants (*f*).

The Commencement of War: (i.) *The Question of Authorization.* - With respect to the due authorization of war, all that international law is concerned with is that war should be initiated by some authority representing the State, in order that the fact may be duly ascertained and binding on the nation resorting to it. In municipal law the right to declare war is commonly vested in some particular authority (*g*): but the want of formal declaration by the prescribed authority will not preclude the existence of a state of war if hostilities with intent of war have been actually entered on by either party. The requirements of the Hague Convention, No. 3 of 1907, with respect to formal notice will, however, for the most part, obviate any doubts that might otherwise arise on this point in the future.

(ii.) *The Question of Prior Notice:* (a) *Under the Customary Law.* - In view of the fact that the conventional law does not cover all possible contingencies in relation to the commencement of war, the rules of the customary law have not altogether lost their application. Our previous survey of the practice of States on this subject suggests the following conclusions: (1) that under the customary law no formal declaration or specific notice could be regarded as indispensable to the opening of hostilities, although it was usual for belligerents either before that occurrence or shortly afterwards to issue a proclamation announcing the fact of war and sometimes giving reasons for it (*h*): but (2) that whether a formal declaration was issued or not, and whether it was issued before or after the commencement of war, no State was justified in opening hostilities against another State unless friendly relations had been severed at such time and under such circumstances as to guard against any reasonable danger of surprise (*i*). The former of these rules has now been superseded, as between the great body of civilized States, by the provisions of the Hague Convention, No. 3 of 1907; but the second still remains operative.

(b) *The Effect of the Hague Conventions.* The Convention "relating to the pacific settlement of international disputes," No. 1 of 1907, pledges its signatories generally to the adoption or acceptance of various methods of amicable settlement, such as arbitration,

(*f*) Such mitigations are really attributable to a variety of causes, of which the chief have been the requirements of discipline, the general softening of manners, and the development of a keener sentiment of humanity alike in national and international life. On the subject generally, see Hall, 63 *et seq.*; Westlake, ii. 32 *et seq.*; Oppenheim, ii. 60 *et seq.*

(*g*) So, under the British Constitution this right is vested formally in the Crown, although actually in the Cabinet; under the United States Constitution, in Congress; under the French Constitution, in the President with the previous assent of the two Chambers; and under the German Constitution, in the Emperor with the consent of the Bundesrath, except in cases of attack.

(*h*) As to notice to neutrals, see p. 287, *infra*.

(*i*) See p. 7.

mediation, and good offices, before having recourse to war. The nature and effect of these methods have already been discussed (*k*). A more specific obligation is now imposed by the Convention "relating to the opening of hostilities," No. 3 of 1907. This Convention (1) recognizes that as between the contracting Powers hostilities ought not to commence without previous and explicit notice, in the form of either a declaration of war, stating the grounds on which it is based, or an ultimatum, containing a conditional declaration of war (Art. 1); and (2) provides that the existence of a state of war should also be notified to neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph, although neutral Powers cannot plead the absence of notification in a case where it is established beyond question that they were in fact aware of the state of war (Art. 2). The former provision applies only to cases of war between Powers that are parties to the Convention; but the latter applies where either of the belligerents and any neutral Power are parties thereto (Art. 3). Art. 1, it will be observed, whilst requiring an absolute or conditional declaration, does not interpose any interval between the declaration and the commencement of hostilities (*l*). Inasmuch as there is nothing in the actual terms of the Convention to prevent the declaration and attack from being delivered simultaneously, it would seem that on this point the Convention must be read subject to the earlier rule, which forbids treachery and surprise (*m*). Art. 2 merely converts a requirement previously resting on courtesy and convenience into a legal obligation (*n*). The main value of the Convention lies in the fact that it will serve, in cases where it applies and is observed, to mark clearly the fact and date of the outbreak of war, and especially the date as from which neutral duties and liabilities will be deemed to accrue. At the same time, the signatories do not pledge themselves absolutely to refrain from hostilities without a prior declaration, but merely recognize that as between them hostilities "ought not to commence" without previous and unequivocal warning (*o*). The object, no doubt, was to exclude cases in which it might be necessary to use instant force in order to repel some hostile preparation or movement, occurring either at a place where communication with the war-declaring authority would be difficult, or under circumstances where the other party would obviously have no cause for complaint on the ground of surprise (*p*). Both in this and in any other case where acts of force are resorted to with intent of war, but without declaration, a state of war will ensue, and the usual incidents of war will attach in the same way

(*k*) Arts. 3–8; see vol. i. pp. 34, 359. In the Turco-Italian war of 1911 no attempt appears to have been made, either by Italy or by other Powers, to comply with or take advantage of these provisions.

(*l*) A delay of twenty-four hours was proposed but not accepted by the Conference: Pearce Higgins, 204.

(*m*) *Supra*, p. 17.

(*n*) *Infra*, p. 287–8.

(*o*) In the English official translation, however, this is rendered "must not commence."

(*p*) Westlake, ii. 24, 267.

as under the earlier customary law (*q*). Nor do the provisions of the Convention apply where acts of force in the nature of reprisals or pacific blockade are resorted to, whether as methods of constraint short of war, or as measures of international police (*r*); although if the State sought to be coerced should elect to treat such acts as a cause of war, it would seem to be incumbent on it to issue a declaration of war (*s*). The Convention applies to all cases of war between States, whether sovereign or semi-sovereign, as well as to the accession of a new belligerent; but not, of course, to cases of civil war, which do not come within the range of international rules until there has been a recognition of belligerency (*t*). The Convention was signed by 12 States, and has so far been ratified or adhered to by 17 States, including Great Britain and a majority of the greater Powers (*u*). Its requirements, so far as they extend, will probably be observed in future wars between civilized States. But their ineffectiveness as a safeguard against precipitancy in the making of war in a case where either Power is intent on hostilities, is illustrated by the events that attended the opening of the Turco-Italian war of 1911. On this occasion the Italian Government, after making some show of complaint as regards grievances alleged to have been suffered at the hands of Turkey, despatched on the 26th September by cipher telegram an ultimatum to the Turkish Government, with 24 hours' grace from the date of presentation. This was presented at Constantinople on the morning of the 28th September. A reply was immediately despatched by the Ottoman Government, but was pronounced to be unsatisfactory. In the result a declaration of war was issued by Italy on the 29th September, and delivered to the Ottoman Government on the same day; whilst a notification of the existence of a state of war was simultaneously issued to other Powers (*x*). Despite the limits imposed by custom and convention, the opening of hostilities still appears to be mainly a question of strategy.

THE ENEMY CHARACTER OF PERSONS

i. NATIONALITY.

SPARENBURGH *v.* BANNATYNE.

1797; 1 Bos. & P. 163.

Case. During war between Great Britain and Holland, the plaintiff, who was a native of Oldenburgh in Germany, had been

[illegible] p. 10.

See vol. i. 345 *et seq.*

[illegible] This is in order to fix the date at which a state of war will be deemed to have arisen. For a fuller discussion of this subject, see an article by Prof. Westlake, L. Q. R. xxv. 127, April, 1909.

[illegible] p. 11.

See Table, App. xiv.

[illegible] Hostilities commenced at once. See Barclay, The Turco-Italian War, 21 *et seq.*; and for the text of the declarations, 109 *et seq.*

captured by the British, whilst serving as a sailor in a Dutch frigate, and sent to St. Helena. At that place he was by order of the governor put on board the "Caledonia," a British merchant vessel then in want of hands, and served as a sailor on board her during the voyage to England. On arrival in England he was handed over to the commissary of prisoners and held as a prisoner of war. He subsequently brought an action for wages due to him in respect of his service on the "Caledonia." To this it was objected that he was an alien enemy and could not sue whilst in confinement on a contract entered into as a prisoner of war. It was held, however, that, inasmuch as the plaintiff was a natural born subject of a State in amity with Great Britain, and as his character as enemy was founded only on a service which had since come to an end, he was not to be regarded as an alien enemy, and that he could sue on a contract entered into by him, even though he was still held as a prisoner of war.

Judgment.] In his judgment, Eyre, C.J., pointed out that the plaintiff was by birth and natural allegiance a neutral; but that, having been captured whilst serving on board a public vessel of the enemy, he must be considered an alien enemy *quoad* such hostility. As soon, however, as such a person became free from the enemy service the character of enemy would be purged. If, then, the Crown had not thought fit to hold the plaintiff as prisoner of war, he would have been considered not as an enemy but as the subject of a State in amity with this country. The difficulty arose from the fact of his having been detained as a prisoner of war. But he was so detained, not in consequence of having the permanent character of enemy, but as having joined in an act of hostility. The former character arose from the fact of a person being in allegiance to the State at war with us; and the allegiance being permanent, the character was permanent. A neutral might indeed be an enemy with respect to what he was doing under a local or temporary allegiance to a Power at war with us, but when that allegiance determined the enemy character also determined. In the present case, the commission under which the plaintiff, being a neutral, acted, was put an end to by the capture of the frigate on which he was; and his temporary

character of alien enemy ceased and determined with the authority under which he acted.

An alien enemy, in English law, means, generally, an alien who belongs to a country which is at war with Great Britain. In dealing with this question, however, the judgment in *Sparenburgh* v. *Bannatyne* draws a distinction between a permanent enemy character and a temporary or adventitious one. The former is stated to depend on allegiance; this being the form in which English law expresses its conception of nationality (*a*). According to this principle, every person in allegiance to the enemy State is deemed *primâ facie* to have an enemy character; whilst everyone in allegiance to a neutral State is deemed *primâ facie* to have a neutral character. From this it would seem that the English law, in determining enemy character, starts equally with the continental systems from the standpoint of nationality (*b*). And although for many purposes "nationality" as a test of enemy character in war has, as we shall see, now been displaced by "domicile," there are still cases in which it remains operative. So, if on the outbreak of war it were found necessary for military reasons to expel alien enemies from British territory—a measure still permissible, although now unlikely to be resorted to—the test of nationality would still be applied; whilst it would also apply, under the municipal law, to cases where a British subject, even though domiciled elsewhere, was found in arms against his native country (*c*). And this primary test of enemy or neutral character, although liable to be suspended by other tests, is always liable to revert when the latter cease to apply. A temporary or adventitious enemy character, on the other hand, will attach to persons who are bound to the enemy State by some particular bond of association, whether local or personal. This will include (1) persons who are found in the military or naval service of the enemy (*d*); (2) persons who are found serving on board even private vessels of the enemy, subject now, however, to the alleviations provided by the Hague Convention, No. 11 of 1907 (*e*); (3) persons who are engaged in the enemy navigation, or identified with the enemy by the grant of exceptional trading privileges (*f*); and (4) persons who are domiciled or reside and carry on trade in the enemy territory (*g*). And similar principles are recognized by the American Courts; although with some occasional divergence as regards their application (*h*).

(*a*) See vol. i. 50, 172.

(*b*) As to differences in the criteria of nationality, see *ibid.* 172.

(*c*) *Ibid.* 188.

(*d*) *Sparenburgh* v. *Bannatyne* (*supra*).

(*e*) *Ante*, p. 27.

(*f*) *The Hoffnung* (2 C. Rob. 162); *The Hoffnung* (4 C. Rob. 22); *The Indian Chief* (3 C. Rob. 12); *Robinson* v. *Bland* (1 W. Bl. 313). The hostile character will also affect with liability other vessels belonging to the same person that have no national character impressed on them; see *The Hoffnung* (4 C. Rob. at 167).

(*g*) *The Hoffnung* (2 C. Rob. 322; *ante*, p. 22).

(*h*) See *The Venus* (8 Cranch, 253); *The Society for the Propagation of*

Some of these grounds of enemy character or connection, including domicile, which is the most important, will be considered in connection with the case next following (*i*), whilst others will come again under review in connection with the subject of enemy property (*k*).

(ii) DOMICILE.

THE "HARMONY."

[1800: 2 C. Rob. 322.]

Case. In this case the question was as to the liability of certain property which had been captured at sea during the war between Great Britain and France; and this again turned on the hostile or non-hostile character of the owner. From the evidence it appeared that the owner, Murray, was a partner in a house of trade in New York, and that he had gone to France in 1794 as super-cargo of a vessel on behalf of his firm, there to dispose of the cargo. Notwithstanding the special character of this original purpose, he continued to reside in France, save for a brief visit to America in 1795–6, acting on behalf of his firm in the receiving and disposing of cargoes; and, although at the time of the first hearing (*a*), his residence in France had not lasted for a year, yet the evidence of letters and documents all went to show an intention to form a permanent residence there. This was strengthened by the fact that he had thereafter continued to reside there until the date of the present proceedings. On these facts it was held that Murray had acquired a French domicile, and hence an enemy character for the purposes of the war; and that the property was therefore liable to condemnation.

Judgment. Sir W. Scott, in his judgment, observed that the question of domicile was one of considerable difficulty; depending on a great variety of circumstances hardly capable of being defined by any general precise rules. Of the few principles that

the Gospel v. *Wheeler* (2 Gall. 105); *The Friendschaft* (4 Wheat. 105); *The Antonia Johanna* (1 Wheat. 159); and cases referred to in Scott, 604, n.

(*i*) *Infra*, p. 23.

(*k*) *Infra*, p. 152.

(*a*) The claim in the present case had been reserved for further proof in respect of Murray's interest.

could be laid down generally, one was that time constituted the grand ingredient in determining domicile. In most cases it was conclusive. It was not unfrequently said that if a person came to a country only for a special purpose, that should not fix a domicile. But that statement must not be taken without some qualification, or without some regard to the time which such a purpose might occupy. For, if the purpose was of a kind that might or did actually detain the person for a great length of time, then a general residence might grow upon the special purpose. After such a long residence the plea of an original special purpose could not avail; and it must be inferred that other purposes had intruded on the original design, and had thus impressed on the party the character of the country in which he resided. If a man came into a belligerent country at or before the beginning of a war, it was only reasonable not to bind him too soon to an acquired character; but if he continued to reside during a good part of the war, and contributed by payment of taxes and other means to the strength of that country, then he could not be allowed to plead his special purpose against the rights of hostility. There must be a time which would stop such a plea, even though it could not be fixed *a priori*. The question of domicile, in fact, must be considered in relation both to time and occupation, with a great preponderance on the article of time.

For certain purposes, such as the determination of the liability of property to maritime capture in so far as this turns on the enemy character of the owner, the enforcement of the rules prohibiting trade with the enemy, and the exclusion of alien enemies from rights of suit, the British and American Courts have long since adopted the test of domicile (*b*). The nature and consequences of domicile in general have already been described (*c*). The domicile here contemplated is, however, almost invariably a domicile for commercial purposes, for the reason that it is commonly only in cases of trade that the question of the liability of property to maritime capture arises. Such a domicile is therefore frequently styled a "commercial domicile." This denotes a settled residence in a particular country for the purposes of trade, by virtue of which a

(*b*) As to how this came to invade the earlier principle, see Twiss, ii. 298 *et seq.* In English law the transition is well marked in *O'Mealey* v. *Wills*, 1 Camp. 482.

(*c*) See vol. i. 208 *et seq.*

person, even though a subject of some other State, is deemed to be so far identified with the State in which he resides and trades as to share its national character, whether as belligerent or neutral, in time of war. At the same time, similar consequences will attach to the ordinary "civil domicile" in cases where the facts are such as to admit of their application (*d*).

The more important applications of the principle of domicile, in this connection, are shortly as follows: (i.) All persons domiciled in the enemy country are, for the purposes above mentioned, treated as having an enemy character so long as such domicile continues, and this even though they may by nationality be neutrals or even British subjects. As regards neutrals, if a neutral, after the commencement of the war, continues to reside in the enemy country for the purposes of trade, he is considered as adhering to the enemy, and as disqualified from claiming as a neutral (*e*). As regards British subjects, the same rule is applied, with the result that such persons, if they continue resident in the enemy country after the outbreak of war (*f*), will be treated as hostile as far as relates to their trade. Hence their ships and property on the seas will be liable to capture, whilst they themselves will be incapable of suing in the national Courts during the war; although they will not otherwise forfeit their national character, or incur any further penalty, unless they engage in actual hostilities against their own country (*g*). (ii.) Conversely, all persons domiciled in neutral, or British, or allied territory are regarded as having a neutral or friendly character, as the case may be, so long as such domicile continues (*h*). So, even enemy subjects, if domiciled in a neutral country, will be free from the disabilities of the enemy character so far as concerns property connected with their domicile; whilst British subjects, if similarly resident, will be free to engage in trade with the enemy in so far as this is open to neutrals (*i*). And the same rule will apply where enemy subjects are domiciled in British territory, if they are allowed to remain; although in such case, like all other persons domiciled there, they will be debarred whilst such domicile continues from engaging in trade with their native country (*k*). Where a person belongs to one of those

(*d*) As to how far there is any substantial distinction between these forms of domicile, see vol. i. 208 *et seq.* The term "*domicile de guerre*," or "war domicile," which is used by some writers, such as Nys, *Droit International*, iii. 151, and Westlake, Int. Law, ii. 50, is probably more appropriate.

(*e*) *The Indian Chief*, 3 C. Rob. 12. In *The Hoop* the rule was applied to the case of a person trading in the enemy country who also acted as consul for a neutral country. As to the position of consuls, see vol. i. 312.

(*f*) Unless by licence of the Crown.

(*g*) *O'Heirn* v. *Hudson* (1 Camp. 482); *McCagnell* v. *Hector* (3 Bos. & P. 113); *Exp. Ruthledge* (18 Ves. 526); *The Venus* (8 Cranch, 253).

(*h*) *Reid* v. *Reid* (1 M. & S. 726); *The Indian Chief*, 3 C. Rob. App. B. 137; *The Diana* (4 C. Rob. 255, n.); *The Postilion* (Hay & Marriott, 245).

(*i*) *Reid* v. *Reid* (1 M. & S. 726); *The Indian*, 4 C. Rob. 255, n.; *Murray* v. *The Charming Betsy* (2 Cranch, at 120).

(*k*) *Janson* v. *Driefontein Consolidated Mines* (1902, A. C. 484).

communities previously described as "extra-territorial," his domicile will be that of the State under whose jurisdiction he has placed himself (*l*). (iii.) But an "enemy character" which is based on domicile is recognized as being merely provisional and temporary, and may therefore be avoided by proof of abandonment. If, therefore, on the outbreak of war a person resident in the enemy country, whether by origin a British subject or neutral, takes in good faith active steps to transfer himself to another country, he will divest himself of the enemy character (*m*). In such cases, however, the onus of proof will be on the party alleging the change (*n*); although such an abandonment will be more readily inferred when the change is from an acquired domicile to a domicile of origin than where the case is reversed (*o*). But where a person is at once a national of and domiciled in the enemy country, it would appear that when war has broken out, he will not be able to divest himself of an enemy character as regards his trade by migrating to another country (*p*).

Where a person is domiciled in a neutral country, but has a house of trade or an interest in a house of trade in the enemy country, he will also be deemed to have an enemy character; although in this case only as regards such property as may be connected with the enemy house, his other property being deemed to have a neutral character (*q*). On the other hand, where a person, who is domiciled in the enemy country, has a house of trade or an interest in a house of trade in a neutral country, his interest will be treated as enemy property, on the ground that an enemy domicile imparts a general enemy character which will affect all his property embarked in trade (*r*). If, in such cases, the property taken belongs to a partnership, it will be presumed to be divided proportionately

(*l*) See vol. i. 249; Wheaton (Dana), 448.

(*m*) *The Vigilantia* (1 C. Rob. 1); *The Bonja* (5 C. Rob. 60); *The Ocean* (5 C. Rob. 90); *The Gerasimo* (1 Moo. P. C. 88; *U. S.* v. *Grossmayer* (11 How. 47). In the case of *The Venus* (8 Cranch, 253), indeed, it was held by the Supreme Court of the United States that the property of an American citizen who was domiciled in the enemy country was liable to capture and condemnation, even though it had been shipped before the declaration of war; although Marshall, C.J., dissented from this view, holding that a citizen in such a case must be presumed to intend to withdraw, and should therefore be allowed a reasonable time to do so. The latter view appears to be confirmed by the observations made in *The Venus* (*ante*) (5 Wall. at 379), and in *Amory* v. *McGregor* (15 Johnson, 24; Scott, 561); as well as by the English decisions; cf. *Vinal* v. *W. Co.* v. *Heath* (1901, 2 K. B. 819).

(*n*) *The Bernon* (1 C. Rob. 102).

(*o*) See *The Indian Chief* (3 C. Rob. 12); and as to proof of abandonment, vol. i. 211.

(*p*) *La Virginie* (5 C. Rob. 98); and *Jan Hermanus* (2 Wheat. 76).

(*q*) *The Joseph Kloss* (5 C. Rob. at 302); *The Portland* (3 C. Rob. at 43); *The Ceres Asbolt* (4 Wheat. 105).

(*r*) *The Antonia Johanna* (1 Wheat. 159). Wheaton, contrasting this with the previous rule, regards the distinction as unreasonable; but Dana justifies it, regarding each as independent of the other; see Wheaton (Dana), 449, and n. 161.

between the partners, and the share attributable to the partner who has enemy character will be liable to condemnation (*t*).

With respect to corporations, the domicile of a corporation is the place which is considered by law to be the centre of its affairs, irrespective of the nationality or residence of its members. In the case of a trading corporation, this is understood to be its principal place of business; the place, that is, at which it has its central office and chief management (*u*). This centre of administration and control will generally, although not necessarily, be the place at which the corporation is incorporated or registered; but it will often not be identical with the place at which its industrial operations are carried on (*x*).

General Notes. *Enemy Character.* Under the earlier system, on the outbreak of war between two Sovereigns, all those in allegiance to one became "enemies" of those in allegiance to the other. Nor was there originally any distinction of degree recognized in the attribution of enemy character. But with the recognition of the distinction between combatants and non-combatants, and with the lapse of the notion of personal hostility between those who are legally enemies, an "enemy character" came to attach to different classes of persons in different degrees, and with different consequences. At the present time (i.) an "enemy character" in the sense of "active" enmity attaches to all persons, whether subjects or not, who are enrolled in the armed forces of the enemy, or who otherwise assist him in the conduct of hostilities; such persons being subject to all those forms of violence permitted in war, as well as to such commercial and civil disabilities as may attach to the "enemy character" either generally or in any particular system. As regards neutrals, however, it is now provided in effect by the Hague Convention, No. 5 of 1907, Art. 17, that persons so engaged shall not by reason of their being neutrals be treated more severely than would be the subjects of the other belligerent *y*. (ii.) Next, an "enemy character," in a more limited but still in an active sense—may be said to attach to all persons, whether subjects or not, who are found in the employment of the enemy State; such persons being liable to arrest and detention as well as to the civil

(*t*) *The Citta*, 3 C. Rob. 38; *The Hercules*, 2 C. Rob. 322; *The San Jose Indiano*, 2 Gall. 268).

(*u*) See Dicey, Conflict of Laws, 2nd ed. 160; *Cesena Sulphur Co.* v. *Nicholson* (1876), 1 Ex. D. 428; *Imperial Continental Water Co.* (1902), 1 Ch. 781, at 794; *The Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gall. 105.

(*x*) But corporations, although domiciled in one country, are often deemed to be resident in some other country, where they carry on business, for such purposes as liability to local taxation or the jurisdiction of the Courts: *The Cesena Sulphur Co.* v. *Nicholson* (L. R. 1 Ex. D. 428); *De Beers Consolidated Mines* v. *Howe* (1906), A. C. 455); *Bowles Bros.* v. *Imperial &c. Insurance Co.* (2 N. S. W. St. R. 257).

(*y*) Great Britain has, however signed this Convention under reservation of this Article as well as of Arts. 16 and 18.

disabilities incident to that character, although not otherwise exposed to violence. It is, however, provided by the Hague Convention, No. 5 of 1907, Art. 18, that the rendering by a neutral to a belligerent of services in the matter of police and civil administration shall not have the effect of conferring an enemy character in the sense just described (*z*); and, further, that the furnishing of supplies or loans by a neutral to one belligerent shall not have that effect, provided that the neutral does not live in and that the supplies do not proceed from the territory belonging to or occupied by the other belligerent (*aa*). In the same category also, we may class seamen who are found on enemy merchant vessels; such persons, even though neutrals by nationality, having formerly been liable to arrest and detention during the war by reason of their fitness for use on board warships or transports of the enemy; although this is now subject to the alleviations provided by the Hague Convention, No. 11 of 1907, Arts. 5–8 (*b*). (iii.) Finally, an "enemy character," in a merely passive sense, is attributed to all persons who are deemed to be identified—as by nationality according to one view, or by domicile according to another—with the enemy State, for the purposes of the war; such persons being subject during the continuance of the war to certain civil or commercial disabilities, which vary, however, in different systems; and their property on the sea being also liable to maritime capture unless protected by the neutral flag. But in the determination of "enemy character" in this last sense, there is a marked difference between the principles followed by different States or groups of States; some adopting for this purpose the criterion of nationality, whilst others adopt that of domicile, although not in either case to the exclusion of certain minor or subordinate tests. Before proceeding to consider this, however, it is desirable to notice that all persons residing or coming within the sphere of belligerent operations are subject to the ordinary incidents of war, in so far as these affect non-combatants. At the Hague Conference, 1907, it was indeed proposed to confer special privileges on persons of neutral nationality who might find themselves in this position, by exempting them from requisitions for services having a direct bearing on the war, as well as from contributions, and from the destruction of their property save in case of necessity and on condition of indemnity; but in the result no agreement on the subject was arrived at (*c*). Nor in any case would the grant of such exemptions seem just or desirable. The Final Act, indeed, embodies a *vœu* that the Powers should regulate by special treaties the position, as regards military charges, of foreigners resident within their territories; although without much prospect of any general compliance.

Nationality and Domicile as Tests of Enemy Character. In this connection we need again to recall that national character

(*z*) That is, as "an active enemy"; see Arts. 18 (b) and 17 (b), and p. 299, *infra*.

(*aa*) See Art. 18 (*a*).

(*b*) See p. 173-4, *infra*.

(*c*) See p. 266, *infra*; Pearce Higgins, 85.

originally depended on allegiance, and that an outbreak of war between two Sovereigns served to establish a relation of legal if not personal enmity between all who respectively owed allegiance to them. Subsequently two changes appear to have taken place. One of these, which has already been referred to, was the recognition of varying degrees in the attribution of the enemy character, and a mitigation of its consequences in its minor forms (*d*). The other was that "allegiance" ceased to be the sole or even the main test of enemy character in war, and came to be replaced by "domicile;" this change being attributable to the gradual strengthening of the territorial principle, and the increasing recognition of trade and commerce as sources of strength in war. For some time, at any rate, the new principle appears to have been very generally accepted (*e*). But at the beginning of the 19th century, and under the influence of theories inspired by the French Revolution, yet another change took place. This originated in France, where the *Conseil des Prises*, in 1801, formally discarded the test of domicile for that of nationality; holding that a person must be deemed to retain the character of the State of which he was a national, irrespective of his place of residence, unless and until such national character had been lost or renounced (*f*). The principle thus enunciated by the French Courts appears to have been subsequently followed and adopted in most other European countries (*g*); with the result that Continental opinion and practice reverted, although in an altered form and freed now from the old trammels of allegiance, to the personal as distinct from the local test of enemy connection. Meanwhile the courts of Great Britain and the United States were engaged in elaborating the doctrine of domicile; to which test both these States have ever since continued to adhere. So there arose a notable divergence alike of view and of practice as to the true criterion of enemy character. On the one hand, Great Britain and the United States, and more recently Japan (*h*), adopt "domicile" as the main test of enemy character in war; with the result that persons domiciled in the enemy country are deemed to have a hostile character, and persons domiciled elsewhere a non-hostile character, irrespective in either case of what their nationality may be. On the other hand, most European (*i*) and other States adopt "nationality" as the main test of enemy character in war; with the result that subjects of the enemy State retain the enemy character wherever they may reside, whilst the subjects of neutral States retain their neutral character even though domiciled in the enemy territory (*k*). At the same time neither of these principles is exclusively followed or consistently applied by either group of States. On the one hand, Great Britain and the United States, whilst generally

(*d*) *Supra*, p. 26.

(*e*) See Nys, *Le Droit International*, iii. 151 *et seq.*

(*f*) *Ibid.* 152–153.

(*g*) But Spain and Holland still follow the principle of domicile in determining the question of enemy goods: see Parl. Papers Misc. No. 5, 1909, 117, 118.

(*h*) Takahashi, 778.

(*i*) Other than Spain and Holland.

(*k*) See Nys, *Le Droit International*, iii. 151 *et seq.*

accepting the test of domicile, are nevertheless forced to revert to that of nationality in cases where domicile would clearly be inapplicable (*l*). On the other hand, the States which ordinarily adhere to the test of nationality are forced, when they come to deal with the incidents of war on land, to recognize liability as depending on residence or domicile. The proposal which was made at the Hague Conference of 1907 to confer a special status on neutrals residing in belligerent territory, represents an attempt to carry the European theory to its logical conclusion; but the proposal was, as we have seen, ultimately rejected (*m*). Nor was it found possible to reach any agreement on this subject on the occasion of the Naval Conference of 1908–9. The Declaration of London, Art. 57, indeed, provides that the neutral or enemy character of a vessel shall be determined by the flag she is entitled to fly, and to that extent mitigates the present uncertainty (*o*). But with respect to goods, Art. 58 merely provides that the neutral or enemy character of goods found on board an enemy vessel shall be determined by the neutral or enemy character of the owner; thus leaving open the question as to how that character is to be determined (*p*). Hence the conflict between the rival principles of nationality and domicile is likely to continue until settled by some new Convention or by the International Prize Court.

Why "Domicile" is preferable. Some contrast has already been drawn between these competing principles in the domain of civil status (*q*). Here we are concerned with them only as tests of "enemy character" in war, and mainly for the purposes of maritime capture and restrictions on trade (*r*). In this regard one needs to remember that one of the chief aims of war is to weaken the enemy's resources, by crippling his trade and striking at its instrumentalities, so far as this may consist with the rights of neutrals. From this standpoint "nationality" as a test of enemy character is based on what is no doubt a traditional but at the same time often an illusory bond of association (*s*). In attributing an enemy character to enemy nationals who reside and trade in neutral States, it strikes really, not so much at the interests of the enemy, as at those of the neutral State; whilst in treating as "non-hostile" neutrals who reside and carry on trade in the enemy State, it exempts from the operations of war an instrumentality which must necessarily be a potent source of strength to one belligerent and of mischief to the other. "Domicile," on the other hand, as a test of enemy character for these purposes, rests on a solid basis of actual identity of interest and ministration to the enemy's resources

(*l*) *Supra*, p. 21.
(*m*) *Supra*, p. 27.
(*o*) *Infra*, p. 143.
(*p*) Pearce Higgins, 604.
(*q*) See vol. i. 210.
(*r*) Because for some purposes, even in war, nationality, and for others, residence or domicile, are almost universally accepted: *supra*.
(*s*) And one, indeed, which is already losing its hold, even as a test of political status: see vol. i. 187 *et seq.*

It treats as "enemies" all persons who, even though neutral in point of nationality, yet reside and carry on trade in the enemy State, for the reason that such persons are subject to its control and contribute to its resources; and this, moreover, in virtue of a position which they have voluntarily assumed, and are at liberty to renounce (*t*). It refuses to treat as "enemies" persons who, even though enemy nationals, reside and carry on trade in a neutral State, for the reason that they are subject to the control of and identified in interest with the neutral State rather than with the enemy (*u*). Even as regards liability to the incidents of land warfare, the test of residence or domicile is eminently reasonable; for, even though it may be true that neutrals residing in the belligerent State have no interest in the quarrel, yet the liability in such cases is one which attaches *ratione loci* and not *ratione personæ*, whilst in voluntarily taking up their residence in the belligerent country neutrals must be deemed to have accepted all risks reasonably incident thereto (*x*). To apply any other test would in fact be to discriminate unfairly against resident nationals.

ENEMY TERRITORY.

THE "GERASIMO."

[1857; 11 Moo. P. C. 88.]

Case. During the Crimean war, the "Gerasimo," a ship under Wallachian colours, with a cargo of corn, belonging to owners resident at Galatz in Moldavia, was captured by the British when coming out of the Sulina mouth of the Danube, then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia and Wallachia; although such holding was with the avowed intention of not changing the national character or incorporating the country with Russia. In the Court of Admiralty a sentence of condemnation was pronounced on the ground that the territory in question was in possession of the enemy, and that all persons resident and carrying on trade there

(*t*) See pp. 23, 25, *supra*. This would appear to be a sufficient answer to the objection that the principle of domicile is "artificial" or "anomalous." Others stigmatise it as "barbarous," although it is difficult to see on what grounds the rival principle of nationality can claim any special sanctity.

(*u*) As to the alleged difficulty in ascertaining and applying domicile, see vol. i. 178 *et seq.*; and as to possible difficulties that may arise in the case where territory changes hands during war, p. 33, *infra*.

(*x*) See vol. i. 204.

must be regarded as enemies with respect to such trade. The owners of the cargo thereupon appealed to the Privy Council; where it was held, reversing the decision of the Court below, that the national character of the owners had not been changed by the Russian occupation, and that restitution must therefore be awarded with costs and damages against the captors.

Judgment.] In the judgment of the Privy Council, which was delivered by the Rt. Hon. T. Pemberton Leigh, the first question dealt with was, whether the owners of the cargo were, in regard to that claim, to be considered as alien enemies. As to this it was laid down that the national character of a trader was determined for the purposes of the trade by the national character of the place where it was carried on. If war broke out, a foreign merchant had a reasonable time allowed him for transferring himself and his property to another country. If he did not avail himself of the opportunity, then he was to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carried it on, and, of course, as an enemy of those with whom that Power was at war. As to the circumstances necessary to convert a friendly or neutral territory into enemy territory, it was not sufficient that the territory in question should be occupied by a hostile force and subjected during its occupation to the control of a hostile Power, unless it was either by cession or conquest or some other means, permanently or temporarily incorporated with and made part of the dominions of the invader (*a*).

The rule that the national character of a place was not changed by the fact that it was in the possession and control of a hostile force had been acted on not only in prize cases (*b*), but also in the courts of common law (*c*); and the distinction between a hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by lapse of time, had been recognized by Lord Stowell in the case of *The Bolletta* (1 Edw. 171). These and other authorities seemed to establish the proposition that the

(*a*) *The Leyde* (5 C. Rob. at 115).
(*b*) *The Manilla* (1 Edw. 1); *The Neptunus* (1 Edw. 180).
(*c*) *Donaldson* v. *Thompson* (1 Camp. 429); *Hoseason* v. *Kelly* (1 M. & S. 450).

mere possession of a territory by an enemy's force did not of itself necessarily convert the territory so occupied into hostile territory or its inhabitants into enemies. In the present case, having regard to the circumstances under which the occupation of Moldavia by Russia had been undertaken, continued, and ultimately brought to an end, it seemed impossible to hold that Moldavia ever became a part of the dominions or its inhabitants subjects of Russia; for, otherwise, at what period could foreigners be said to have had notice of the change of dominion, or an opportunity of changing their domicile, as required by the decision in the case of the *Fama supra*. Nor had any act been done by the British Government to change the national character of the provinces in relation to Great Britain.

With respect to the question whether the vessel had not been guilty of a breach of blockade by coming out when the mouths of the Danube were in a state of notified blockade, it was laid down in effect, that inasmuch as the object of the blockade as officially stated was to prevent the import of provisions for the use of the Russian forces, and inasmuch as Russia on her part had forbidden their export, the export in the present case was really in furtherance of the objects of the allies, and could not, having regard to these circumstances and the terms of the notification, be regarded as a breach of blockade or as involving the vessel in liability to capture.

From this decision, as well as from other authorities referred to in the judgment, the view of the English Courts appears to be: (1) That a temporary occupation of friendly or British territory by an enemy will not impart an enemy character to the territory or its inhabitants, so as to render the property of the latter liable to maritime capture or to expose them to those civil and commercial disabilities that attach to the enemy character *d*. (2) That, conversely, a temporary occupation of hostile territory by friendly forces will not remove its enemy character for these purposes, or relieve its inhabitants from their consequent disabilities *e*. Nor, despite some contrary authority, does it appear that an occupation of enemy territory by British forces would have any other effect *f*. Nevertheless, so far as relates

d. *The Santa Anna* (1 Edw. 186); *Jourdain* v. *Bell* (1 M. & S. 459). *The Ann* and *Hoops Case*.

ex rel. *The Manilla* (1 Edw. 1).

f. But see *The Anne Catlin* (1 C. Rob. 107); *The Fortuna* (1 Dods.

to carriage of contraband and trading with the enemy, it would seem that the fact of an enemy port for which the goods in question were destined having been meanwhile occupied by British forces will have the effect of avoiding the offence; for the reason that in either case it is essential to guilt that the goods should be taken whilst on a destination for the enemy's use (*g*). And the same rule would probably be applied in cases of blockade (*h*). But where territory has been conquered and definitely appropriated, then both the soil and its inhabitants will be deemed, for all purposes, to acquire the national character of the conquering or annexing State (*i*).

In so far as these rules imply that the permanent national character of a place and its inhabitants cannot be altered by military occupation, or by anything short of definitive conquest or cession, they are quite in accord with established principles (*k*), and are equally recognized by the courts of other countries (*l*). But in so far as they fail to recognize that even a temporary occupation and control of home or friendly territory by an enemy will warrant its being treated as hostile for commercial as well as belligerent purposes, they do not appear to be in keeping with the practical exigencies of war. Nor are they in accord with the American decisions on this subject. The exigencies of war require that all territory which is under the actual control of the enemy should be subjected to the same restrictions as regards trade as enemy territory proper, and with the same consequences as regards individuals engaging in such trade; not because the latter have become personally hostile, but because by their trade they contribute to the strength and resources of the enemy (*m*). Hence the American Courts, whose decisions on this subject are cited with approval in the English text-books (*n*), whilst fully recognizing that acquisitions made during the war are not to be considered as permanent unless confirmed by treaty (*o*), yet adopt the view that when either home or friendly territory has passed into the occupation and control of the enemy, it must be treated as enemy territory, in the technical sense of the laws of war, for commercial as well as for belligerent purposes. So, in *Bentzon* v. *Boyle* (9 Cranch, 191), it was held by the United States Supreme Court that the Island of Santa Cruz, which belonged to Denmark but had

(*g*) *The Franklin Sarchet*, 6 C. Rob. 391, n.; *The Abby*, 5 C. Rob. 251; . . ., p. 35, n. (*a*).

(*h*) *The Leucade*, 6 C. Rob. 387; but as to the American decisions on this point, see p. 34, *ante*.

(*i*) *The Rebecca*, 1 Gallis. 171.

(*k*) See H. R. 42 *et seq.*, and pp. 107, 255, *ante*.

(*l*) See, in the French courts, *Dallas and Co's Case*, where it was held that a crime committed by a French man in territory belonging to Spain, but at the time occupied by the [ ] forces, was a crime committed on foreign territory: Ortolan, i. 324; and in the American courts, *Neely* v. *Henkel*, 180 U. S. 109.

(*m*) Hall, 503.

(*n*) Hall, 502.

(*o*) Taylor, 601.

during war between that country and Great Britain been occupied by the latter, must be regarded as British and hence as enemy territory for all the purposes of the war then proceeding between Great Britain and the United States; and that the produce of estates owned there, even by a person resident in a neutral country, must, if still remaining in the hands of the owners of the soil, be treated as enemy property and as liable to capture on the sea by the United States (*p*). If an enemy occupation of national or friendly territory confers a hostile character, it would seem to follow that a national or friendly occupation of enemy territory must free it from its enemy character. Nevertheless it was held in the case of *The Circassian* (2 Wall. 135) that the capture and occupation by the United States forces of the city and port of New Orleans, which they had previously held under blockade, did not have the effect of suspending its enemy character or of terminating the blockade; and hence that a British vessel which had entered the port after the occupation was still liable to condemnation (*q*). This decision, however, afterwards became the subject of a claim before the British and American Claims Commission, which made awards in favour of the claimants to the extent of $225,000 (*r*).

General Notes. *Enemy Territory.*—The question of what constitutes enemy territory is important, first, as determining the range of military and naval operations, and the legality of hostile captures, in so far at least as these are forbidden within neutral territory and waters. For this purpose enemy territory will include—(1) territory owned by the enemy State, including all territorial waters and attendant areas, as ascertained by the principles and methods previously referred to (*s*); (2) territory leased or held in usufruct by the enemy State, or included within the limits of its colonial protectorates (*t*); (3) territory occupied and administered by the enemy State, either permanently or for an indefinite period, even though the nominal sovereignty may remain in

(*p*) See Scott, 598; and Wheaton Dana), 121, n. The same rule has also been applied in the Customs cases; as in *U. S. v. Rice* (4 Wheat. 246; Scott, 655), where it was held that an American port then occupied by the British was to be regarded as British territory for Customs purposes, and hence that goods imported during that time were not liable to American duty after evacuation. But in *Fleming v. Page* (9 How. 603; Scott, 659) this was held not to apply to goods imported into the United States from Mexican territory, then in occupation by the United States' forces, so as to exempt such goods from duties payable thereon as coming from a foreign country.

(*q*) The reason assigned was that the surrounding districts still remained hostile and the occupation subject to the vicissitudes of war.

(*r*) See Moore, Int. Arb. iv. 3941; Hall, 509; Scott, 828, n. Nevertheless the decision was approved and followed in *The Adula* (176 U. S. 361); see *infra*, p. 408.

(*s*) See vol. i. 105 *et seq.*

(*t*) *Ibid.* 112.

some other power (*u*); (4) territory held by the enemy State jointly with any other Power, provided the actual control and exercise of authority are vested in the former (*x*); and, finally, (5) territory which, although otherwise friendly, has been temporarily occupied by, and is under the present control of, the enemy (*y*). In the second place, both in the British and other systems which adopt the criterion of domicile as a test of enemy character in war, the question of what constitutes enemy territory is, as we have seen, important as determining the commercial disabilities of persons domiciled there and the liability of their property to maritime capture. The nature of the rules applied in this connection have already been sufficiently indicated (*z*).

THE EFFECT OF WAR ON TREATIES AND OTHER ENGAGEMENTS OF THE BELLIGERENTS.

THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS *v.* THE TOWN OF NEW HAVEN AND WHEELER.

[1823; 8 Wheat. 464.]

Case. The plaintiff Society was a British corporation, established by royal charter in 1702 for promoting certain religious objects. In 1761 the Governor of New Hampshire had granted to the inhabitants of that province a certain tract of land, which was to be incorporated into a town under the name of New Haven, and to be divided into sixty-eight shares, of which one was granted to the plaintiff Society. The tract in question was subsequently divided amongst the grantees, and a portion assigned to the Society. In 1794, after the American Revolution, the Legislature of the State of Vermont passed an Act purporting to confiscate these and other lands granted to the Society, in favour of the townships in which they were respectively situated, and

(*u*) See vol. i. 55, 115.

(*x*) *Ibid.* 55; Hall, 505–506; and, on the subject generally, Oppenheim, ii. 85 *et seq.*

(*y*) So, too, contraband destined for territory even temporarily occupied by the enemy is to be regarded as having a hostile destination: see Declaration of London, Arts. 30, 35; and p. 111, *post*.

(*z*) See p. 33.

further authorizing the selectmen of each township to recover such lands and to lease them for school purposes. In 1800, by virtue of this law, the selectmen of New Haven executed a perpetual lease of a part of the Society's lands to the defendant Wheeler, who thereupon entered on the lands and thereafter held possession of them: the Society having apparently made no attempt to assert its title until the commencement of the present proceedings.

By Art. 6 of the treaty of peace made in 1783 between Great Britain and the United States, it was provided, in effect, that no confiscation should be made or prosecution commenced against any person for having taken part in the war, and that no person should on that account suffer any loss or damage in person, liberty or property. By Art. 9 of another treaty made in 1794 between the same parties, it was further provided that British subjects who held lands in the United States should continue to hold the same according to the nature of their respective estates and titles; and that with respect to such lands and all legal remedies incident thereto neither they nor their heirs or assigns should be regarded as aliens (*a*). In 1812, however, war again broke out between the parties to these treaties; the war having been terminated by the Treaty of Ghent in 1814. The present suit was an action of ejectment brought by the Society against Wheeler in respect of the lands leased to him. It was originally brought in the Vermont Circuit Court; but the judges of that Court being divided in opinion, the question was certified, in the form of a special verdict embodying the facts above mentioned, to the Supreme Court for its opinion. At the hearing it was contended *inter alia* on behalf of the defendants, 1 that the Society, being a foreign corporation, was incapable of holding land in Vermont, and that its rights were not therefore protected by the treaties of 1783 and 1794; 2 that, even if they were so protected, the effect of the subsequent war of 1812 between Great Britain and the United States was to put an end to those treaties and all rights derived thereunder, except in so far as they were preserved by the subsequent treaty of peace, which in the

(*a*) This provision being reciprocal.

present case contained no such reservation. The Court, however, by a majority, held that these objections could not be sustained, and that on the special verdict judgment must be entered for the plaintiff Society.

Judgment. The opinion of the Court was delivered by Washington, J. In effect, it was held (1) that the capacity of private persons being British subjects, or of corporations created by the British Crown, to hold lands or other property in the United States, was not affected by the Revolution; (2) that the terms of Art. 6 of the Treaty of 1783, which were unqualified and which purported to protect the rights of all persons on either side from forfeiture or confiscation by reason of any part which they might have taken in the war, extended to protect property of corporations equally with that of natural persons; (3) that the title of the Society as thus protected, and as confirmed by the Art. 9 of the Treaty of 1794, could not be forfeited by any intermediate Act of the Legislature of Vermont or other proceeding for defect of alienage; and (4) that even if such treaties had been terminated, as was alleged, by the subsequent war of 1812, and even if the rights thereunder had not been revived by the Treaty of 1814, this would not divest rights of property which had been already acquired under them, any more than the repeal of a municipal law would affect rights that had already vested during its existence. Nor was the Court inclined to admit the doctrine which had been urged at the bar that treaties became extinguished *ipso facto* by war as between the parties thereto, unless they were expressly or impliedly revived on the return of peace. Whatever might be the latitude of doctrine laid down by writers on the law of nations, dealing with the subject in general terms, it was clear that that doctrine was not universally true. There might be treaties of such a nature, as to their object and import, that war would put an end to them. But where treaties contemplated a permanent arrangement of territorial or national rights -or were meant to provide for the event of war it would be against every principle of just interpretation to hold them extinguished by war. If such were the law, then the Treaty of 1783, which had fixed the limits of the United States and acknowledged their

independence, would be gone; and the struggle for both would have to be begun again. The Court was therefore of opinion, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, or to deal with the case of war as well as of peace, did not cease on the occurrence of war, but were at most only suspended whilst it lasted; and that such treaties, unless they were waived by the parties, or unless new and repugnant stipulations were made, revived in their operation at the return of peace.

Directly, this case decides that, from the point of view of the American Courts, private rights which have been acquired or confirmed by treaty will not be divested by subsequent war between the parties. Incidentally, it also embodies a judicial declaration of the principle that treaties stipulating for permanent rights, or purporting to be perpetual, or contemplating a state of war, do not cease on the occurrence of war, but are at most suspended whilst it lasts, and revive on the restoration of peace in default of contrary agreement. And with this conclusion both the doctrine of the English Courts (*b*) and the present international practice may be said to agree. Subject to these recognized exceptions, however, the predominant Anglo-American view appears to be that treaties previously subsisting between the belligerents are put an end to by war unless expressly revived (*c*). The question whether a treaty or stipulation was intended to set up a "permanent state of things" must be judged in the light of the terms of the treaty or stipulation, and the circumstances of each particular case. The controversy already described, which arose between Great Britain and the United States after the war of 1812 as to whether certain concessions made to the latter under the previous treaty of 1783 had or had not been abrogated by the war, will serve to illustrate the application of this principle (*d*).

THE CASE OF THE RUSSO-DUTCH LOAN, 1854.

1854. Parliamentary Debates, 3rd series, Vol. CXXXV., 1096.

Case. In 1814, Great Britain, in consideration of being allowed to retain certain Dutch colonies and dependencies which she had acquired during the war, undertook to pay a portion of

(*a*) See [illegible] cases there cited: Westlake, i. 31, 663; Wharton, ii. 43 *et seq.*; Moore, [illegible]; Digest, v. 372 *et seq.*

(*b*) [illegible] 4 C. Rob. 63; Phill. iii. 791 *et seq.* and a number

(*c*) See vol. i. 153 *et seq.*

a certain loan which had been made by Holland to Russia during the war. By a Convention of the 19th May, 1815, embodying the terms of this arrangement, it was agreed between the contracting parties *a*, that the payments on the part of Great Britain should cease and determine if the possession and sovereignty of the Belgic provinces should at any time pass or be severed from the dominion of the King of the Netherlands; but that the obligation of payment should not be interrupted by the outbreak of war between any of the three contracting parties. On the subsequent separation of Belgium from Holland in 1831, Great Britain, conceiving that even though released by the letter of the Convention she was still bound in equity to adhere to the engagement, concluded on the 10th November, 1831, a new Convention with Russia, whereby after reciting that the object of the earlier Convention was, on the one hand, to afford Great Britain a guarantee that Russia would on all questions concerning Belgium identify her policy with what Great Britain deemed best for the maintenance of the balance of power in Europe; and, on the other, to secure to Russia the payment by Great Britain of a portion of her debt to Holland Great Britain engaged, subject to the consent of the British Parliament, to continue the payments stipulated in the Convention until the debt had been fully liquidated.

The issue as raised in Parliament. On the outbreak of war between Great Britain and Russia in 1854, a motion was made in Parliament to the effect that Great Britain should renounce her obligation to make any further payments, on the ground that Russia had violated the general arrangements of the Congress of Vienna. The motion was, however, rejected upon the ground, among others, that "Great Britain, being at war with Russia was bound by a regard to her national honour to be more than ever jealous of affording the slightest ground for the accusation that she wished to repudiate debts justly contracted with the Power which was for the time being her enemy *b*. In consequence of

(*a*) Great Britain, Holland and Russia. Swiss, G. 112.

this, the interest on the loan was paid throughout the war to the agents of the Russian Government.

The earlier Convention, it will be seen, contained an express stipulation that performance should not be interrupted by war. It is now universally recognized that the obligations of treaties which either contemplate or are expressly declared to be unaffected by war are not impaired thereby. The second Convention, however, contained no such stipulation; and the incident may therefore be said, having regard both to the conclusion arrived at and the grounds on which it was based, to sanction the view, which is now also generally accepted, that the outbreak of war will not of itself discharge or extinguish debts or other financial obligations previously subsisting either between the belligerent States themselves or between one of them and the subjects of the other. This rests in part on the fact that such engagements are contracted on the faith of the national honour; but in part also on an appreciation of the fact that but for the existence of such an understanding the procuring of loans, especially from individuals or corporations, would be attended more difficult and more costly *(d)*. In the case of loans by individuals, this principle is now probably fully recognized; but as regards financial obligations subsisting between the hostile States themselves, its precise limits are, as we shall see, not so well ascertained *(e)*.

GENERAL NOTES.—*The Effect of War on Treaties:* i. *Opinion.* On the question of the effect of war on treaties previously subsisting between the belligerents there is much diversity of opinion. Some writers opine that such treaties are only suspended by war, unless they are from their very nature or terms contingent on peace *(a)*. Others opine that all treaties are abrogated by war, subject, however, to certain exceptions, the range of which varies with different writers *(b)*. Others again, draw a distinction between treaties proper, such as treaties of commerce, extradition, and alliance, which are said to be abrogated by war and not to revive on the restoration of peace except by express stipulation, and what are called transient or executed contracts, such as cessions of territory, settlements of boundaries, and grants of servitudes *(c)*, which are not generally affected by war, although liable, of course, to be displaced by some

(a) Bynkershoek, *Quæstiones Juris Publici*, lib. i. c. 2; Vattel, liv. iv. c. 4, § 65; Wheaton, Part iii. ch. 2, § 3; Halleck, ch. 36, § 31; Hall, 432.

(b) Grotius, liv. ii. c. 15, § 16; Phillimore, iii. 795 *et seq.*; Taylor, 461.

(c) Phill. iii. 795 *et seq.*

(d) These being really in the nature of dispositions; see vol. i. 326.

new disposition made on the conclusion of peace (*i*). Beneath this divergence of opinion, however, there is a certain element of common agreement, in so far as some kinds of treaties are universally recognized, either by way of rule or exception, as surviving the war, whilst other kinds again are equally recognized as being abrogated by war (*j*).

(iii.) *Practice.* With respect to the practice of States, it was at one time usual on the outbreak of war for each belligerent to make a public proclamation that all treaty obligations between the parties were at an end (*k*). This practice has long since ceased; but it is probably responsible in some degree for the prevalent view that the effect of war is to abrogate all treaties which are not in the nature of dispositions. Hence in recent times it has been the usual although not invariable practice for States that have been at war to assume that treaties have been abrogated, and on the restoration of peace to revive expressly all treaties which have not lost their application and which the parties desire to maintain. Such an assumption, at any rate, appears to have prompted the arrangements that were made by the Treaty of Paris, 1856, on the close of the Crimean war. Again, on the close of the war of 1859, all prior treaties were confirmed by the Treaty of Zurich as between Austria and Sardinia; although not as between Austria and France. At the close of the war of 1866, all prior treaties were revived as between Austria and Italy; and also, in so far as they remained applicable under the altered conditions, between Austria and Prussia. At the close of the Franco-Prussian war in 1871, treaties of commerce, navigation, extradition, and certain conventions relating to copyright and railways were expressly confirmed, although no mention was made of other treaties (*l*). At the close of the Spanish-American war, no provision with respect to treaties appears to have been made by the Treaty of Paris, 1898 (*m*); but by the subsequent Treaty of Madrid, 1902, Art. 29, it was provided that all treaties made between the parties prior to the Treaty of Paris should be abrogated, with the exception of a treaty of 1834 (*n*). After the blockade of the Venezuelan ports by Great Britain in 1902, it was agreed by a protocol of the 13th February, 1903, that inasmuch as it might be contended that a state of war had existed and that all treaties had been abrogated, it should be recorded by an exchange of notes that a certain treaty of 1834, which it was desired to continue, should be renewed and confirmed (*o*). The Treaty of Portsmouth, 1905, which put an end to the Russo-Japanese war, contains no express provision on the subject, beyond a recital that the prior treaty of commerce and navigation had been annulled by the war, and a stipulation that pending the conclusion of a new treaty the subjects of each party should

(*i*) Hall, 379 . . . Westlake, Wheaton Dana, 252, n.; Nys, 53–54 (*j*) Westlake, ii. 32, n. (*k*) Phill. iii. 793–794. (*l*) Hall, 380 . . . (*m*) . . . B. & F. S. P. vol. xc. 382. Relating to the settlement of certain claims between the two countries; see B. & F. S. P. vol. xcv. 816. (*n*) . . . Sc. . . vol. i. 341, 344.

be treated by the other as favourably as those of the most favoured nation (*p*).

The rule of Abrogation and its exceptions. Having regard to this divergence of opinion and the absence of complete uniformity in practice, it is probably safer to assume it to be the general rule, that treaties previously subsisting between the belligerents are abrogated by war; and to leave it to the parties to revive them either expressly or impliedly on the restoration of peace if they think fit. And this conclusion is confirmed not only by the common practice, but also by the consideration that it would otherwise often be difficult, in view of the changes wrought by the war in the circumstances and relations of the parties, to determine precisely how far prior treaties retained their applicability. This rule is, however, subject to a great variety of exceptions. In dealing with these it will be convenient to distinguish between treaties to which the belligerents only are parties and treaties to which other Powers are parties. (1) Amongst treaties of the former kind, we may exempt from the primary rule of abrogation the following classes: (a) Treaties which expressly contemplate a state of war (*q*), or which are expressly saved from being affected by war (*r*). (b) Treaties which create or define rights *in rem*; such as treaties ceding territory, defining boundaries, creating servitudes or recognizing international status. This exception rests on the fact that such treaties supply in international transactions the place of dispositions or settlements in private life; and that once such rights have been created or recognized they then depend not on treaty but on the general law, even though the treaty may remain as a source or record of title (*s*). But this will not apply to rights which clearly appear, either from the terms of the treaty or the circumstances of the case, to be in the nature of merely temporary concessions (*t*). Moreover, even the rights that accrue under dispositive treaties may be suspended as to their exercise during the war, or displaced by other arrangements made in consequence of it, although they will otherwise revive automatically (*u*). (c) Treaties which, although [illegible] in the nature of dispositions, are nevertheless intended by the parties to set up a state permanent relation or arrangement; such as treaties regulating the acquisition of nationality, or mutually conferring on subjects of either party the privilege of holding lands within the territory of the other. The operation of such treaties

(*p*) Art. 12. Treaty of [illegible], 1856.

(*q*) [illegible] of 1794 between Great Britain and the United States, [illegible] against the [illegible] confiscation of private debts and [illegible] Limits of treaties in the event of war.

(*r*) See the treaties cited [illegible]

tained in the treaty of 1815 between Great Britain and Russia, which provided that the payment of interest on the Russo-Dutch loan should not be affected by war; [illegible] p. 39.

(*s*) See vol. i. 326; Hall, 382.

(*t*) See vol. i. 133, 159.

(*u*) See Hall, 382.

again may be suspended by the occurrence of war (*x*); but for the rest, they will retain their validity, and their operation will revive on the restoration of peace without express renewal unless positively rescinded (*y*). But where war is resorted to as a means of compelling the fulfilment of a treaty, and especially where it arises out of a dispute as to the meaning of a treaty, it would seem that the treaty must be deemed to have been annulled by the war, unless revived by express stipulation (*z*). (2) With respect to treaties to which other Powers than the belligerents are parties, these will not, in general, be affected by the outbreak of war between particular signatories, but will continue binding as regards other Powers, and will revive even as between the belligerents themselves when the war comes to an end. So the great law-making treaties, previously referred to (*a*), remain unaffected by war between the parties (*b*). And even where such treaties are subject to denunciation, it is frequently stipulated that they shall remain obligatory for a year from the time at which the notice of denunciation is given: which would ordinarily serve to prevent them from being denounced in anticipation of war (*c*). The great international settlements (*d*) are also unaffected by war between particular signatories; and even if the war should arise over some matter contained in the treaty it would seem—in so far as the matter can be said to be governed by legal rules—that no new arrangement can strictly be made without the consent of the other signatories, although this is frequently disregarded in practice (*e*). Nevertheless, where a treaty of this character imposes obligations of an active kind, it is recognized that the discharge of such obligations may be temporarily suspended by the existence of a state of war between the parties or some of them; both by reason of the impossibility of united action, and of the fact that an active fulfilment of the treaty obligations might be inconsistent with the requirements of self-preservation as re-

(*x*) As where the municipal law or policy precludes enemy subjects from availing themselves of such rights during the continuance of war. In the Turco-Italian war of 1911, Turkey issued a notification that Italian subjects would no longer be entitled to the benefit of the capitulations, which, in the circumstances and having regard to the suspension of consular functions, appears to have been warrantable, at any rate, during the continuance of the war.

(*y*) Although even in such cases the precaution of express renewal is sometimes adopted.

(*z*) Hall, 383.

(*a*) See vol. i. 10.

(*b*) Many of the conventions framed by the Hague Conferences of 1907 are intended to apply to a state of war, *supra*, p. 13.

(*c*) See the Geneva Convention, 1906, Art. 33.

(*d*) See vol. i. 11.

(*e*) On the conclusion of the Russo-Turkish war in 1878 the re-settlement of the various issues under earlier settlement of 1856 was submitted to the Congress of Berlin, which was attended by all the parties to the Treaty of Paris, 1856, Italy taking the place of Sardinia: see vol. i. 12. But the annexation of Bosnia and Herzegovina by Austria, in 1908 (see vol. i. 50, n.), and, more recently, the virtual abrogation of the Algeciras Convention of 1906 (see vol. i. 115), although in each case without war, were effected without reference to the parties to the original settlement.

gards the Powers involved in the war. Such, for example, would have been the position of France, in 1870, as regards the guarantee of the integrity of the Ottoman Empire to which she was a party under the Treaty of Paris, 1856. Treaties, moreover, which are from their very nature dependent on a continuance of friendly relations, such as treaties of commerce, are necessarily abrogated by war so far as the actual belligerents are concerned, even though other Powers may be parties thereto. What has been said with respect to treaties generally may also be taken to apply to particular stipulations contained in a treaty; for the same treaty may contain stipulations some of which are and some of which are not abrogated by war. *f*

The Effect of War on the Financial Engagements of States.— Such engagements may exist either with other States, or with individuals or corporations. On this subject the following conclusions appear to be warrantable in principle, as well as from the standpoint of modern practice so far as that extends:—(1) Where money has been lent to a State on the faith of its public credit, the fact that the loan or any part thereof has been subscribed or is held by nationals of a State between which and the debtor State war has broken out will not justify either a repudiation of the debt or a sequestration of principal or interest. That private interests in public debts are exempt from reprisals and sequestration, both in peace and war, may probably be taken to have been established as one of the results of the controversy which took place between Great Britain and Prussia in 1753 with respect to the Silesian loan *g*, whilst it has also been affirmed by particular treaties *h*, and is now still further strengthened by the desire of States to maintain their credit in the money markets of the world *i*. At any rate, the practice on the subject is virtually unbroken. Even the Southern Confederacy in 1861, in decreeing the sequestration of the property of alien enemies, excepted "public stocks and securities." (2) In the case where a State or group of States guarantee a public loan made by individuals to some other State, the liability of the guarantors to the

f On this subject generally, see [illegible] Westlake, ii. 29 [illegible] Bar, ii. 335 and [illegible] 196.

g See [illegible] 335. For an account of the settlement of the debt of Lower Canada to the British [illegible] with [illegible]

[illegible] 204, and [illegible] United States [illegible] of [illegible] [illegible] they may have in the public funds, [illegible] shall in event of war be sequestrated or confiscated; it being declared unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other and in their respective governments should ever be destroyed or impaired on account of national differences, see Art. 10.

i Besides existing credibilities, moreover, the same end is attained owing to the fact that the securities issued for such debts are usually of a negotiable character, and can thus be transferred to neutrals, against whom the plea of enemy character would be unavailable; *Law*, p. 87.

principal creditors would, in view of the same considerations, not be affected by the outbreak of war between the debtor State and one or more of the guarantor States; and the same would apply to any liability that might be incurred towards the guarantors by the debtor State itself, although in this case subject to the possible qualifications suggested below. (3) In the case, not now so common, where one State advances money directly by way of loan to another State, there would usually be an express stipulation against any annulment of the obligation by war, but even in default of this the trend of modern practice (*l*) appears to sanction the view that such an engagement should be respected. It is, however, contended by some that the debtor State, even whilst respecting the engagement ultimately, would be justified in suspending payment of interest or principal to the enemy during the continuance of the war (*m*); but this conclusion, although justified by the analogous suspension of private debts under the Anglo-American rules (*n*), is not borne out by modern examples so far as these avail (*o*). In any of these cases it is, of course, conceivable that the debtor State might be prevented by the financial strain imposed by the war from fulfilling its engagements; but the default in such a case would rest on different grounds and be governed by different principles (*o*).

THE EFFECTS OF WAR ON LAW: FORMS OF WAR-LAW.

MARAIS *v.* THE GENERAL OFFICER COMMANDING THE LINES OF COMMUNICATION, AND THE ATTORNEY-GENERAL OF CAPE COLONY; *Ex parte* D. F. MARAIS.

[L. R. 1902, A. C. 109.]

Case. In August, 1901, during the war between Great Britain and the late South African Republic, Marais, a British subject, resident in Cape Colony, was arrested there by order of the military authorities, on a charge of having violated certain regulations which had been made in pursuance of a proclamation

(*l*) As to the British practice of 1854, see p. 38, *ante*; as to South in 1898 continued to pay interest by her to the United States; see Bordwell, 127.

(*m*) See Phill. iii. 798; Lorimer, 21 [illegible], pp. 66, 86.

(*n*) On the subject generally, see Hall, 437; Phill. iii. 445 [illegible], and Taylor, 442, 542.

of martial law previously issued. He was thereupon removed to another district in the same colony, and thereafter detained in custody. Neither the district in which he was arrested, nor that to which he was removed, were, at the time, the scene of active military operations, but both were within the area of the proclamation of martial law in pursuance of which the regulations in question purported to have been made. By this proclamation, which was issued on the 1st May, 1901 *a*, it had been announced that all persons residing in Cape Colony, who, in districts where martial law prevailed, were found actively in arms against the King, or incited others to take up arms, or actively aided the enemy, or committed acts endangering the safety of His Majesty's forces or subjects, would on arrest be tried by a military Court, and on conviction be liable to certain penalties; and, further, that any person reasonably suspected of any such offence would be liable to be arrested without warrant, and to be sent out of the district, or to be dealt with by a military Court. On the 6th September, Marais, who was still in custody, presented a petition for release to the Supreme Court of Cape Colony, on the ground that his arrest and detention were illegal. This petition was refused on the ground that martial law had been proclaimed; that the Court could not inquire into the necessity of the proclamation; and that inasmuch as the prisoner was in the custody of an officer acting under military authority, the Court could not exercise jurisdiction so long as martial law continued in force. Marais thereupon applied to the Privy Council for leave to appeal; but in the result this application was also refused.

Judgment. In the judgment of the Judicial Committee, which was delivered by Lord Halsbury, L.C., it was pointed out that it was [illegible] unassailable rule that where war was being waged the civil Courts had no jurisdiction to deal with military action, and that [illegible] were in question the military tribunals alone were competent. When war was raging, moreover, acts done by the military authorities were not justiciable by the ordinary tribunals. On the various grounds urged on behalf of

a Affixed and posted respectively from the 22nd April.

the petitioner, the only one which was susceptible of argument was that which alleged that inasmuch as the civil Courts were still open the established rule as to the exclusive authority of martial law did not apply. But in the present case there was sufficient evidence that war was in fact raging. Martial law had been proclaimed both in the district in which Marais had been arrested, and in that to which he had been removed. With respect to the existence of a state of war and the consequent legality of martial law, the fact that the civil Courts were sitting for some purposes was not conclusive that war was not raging. It had been previously decided in *Elphinstone* v. *Bedreechund* (1 Knapp, 316), that a municipal Court had no jurisdiction to adjudicate on a seizure of property made in time of war. And no doubt ever existed that when war actually prevailed, the ordinary Courts had no jurisdiction over the action of the military authorities. Cases of difficulty might arise as to whether there was a state of war or not; but when the fact of war was established there was a universal consensus of opinion that the civil Courts had no jurisdiction over military action.

The decision in *Marais'* case, although strictly on a point of English law, yet serves to illustrate the effects of war generally on the ordinary law and on the ordinary legal rights of individuals, whether belligerents or neutrals. In time of war and when a country is invaded or threatened with invasion by the enemy, every Government finds it necessary to assume certain exceptional powers both over persons and property, which are not exercisable in a state of peace. Under the British system this result is attained by a "proclamation of martial law &c." The judgment in *Marais'* case decides in effect (1) that when a state of war actually prevails, the operation of the ordinary law will be deemed to be suspended by martial law in all that relates to the war; (2) that

See Manual of Military Law (War Office, 1907), p. 5. As a matter of constitutional theory, the legality of martial law does not turn on the publication, but on the existence of actual war or insurrection, which renders such a proceeding necessary for the public defence; see *Wolfe* v. *Howes*, [1907] 2 K. B. 52, 59; [1907] A. C. 45, 61. The proclamation is, in itself, only a notification of the existence of such a state of things and of the fact that the executive intends to have recourse to extraordinary measures to suppress it; these being either such measures as are permitted by the common law as being necessary to the maintenance of order, or measures not warranted in strict law but for which it is proposed to obtain a parliamentary indemnity.

acts done by the military authorities in the exercise of martial law will thereupon cease to be justiciable by the ordinary civil Courts; and (3) that under the English system the test of the legality of martial law and of proceedings thereunder is not whether the civil Courts are still sitting but whether a state of war exists or not (*d*). Incidentally, the case also decides that when once a state of war exists, martial law may be exercised even in places outside the range of active hostilities: a conclusion justified by modern conditions, which very often require the adoption of protective or punitive measures at places distant from the scene of actual hostilities (*e*). Nor have the civil Courts any jurisdiction to review the judgments of Courts sitting in the exercise of martial law (*f*); there being no analogy between the proceedings of military Courts sitting under the Army Act and those of Courts sitting in the exercise of martial authority, which do not really administer law (*g*). From this it will be seen how largely, even under the British system, the intervention of a state of war serves to exclude the application of the ordinary law, the jurisdiction of the ordinary courts, and the recognition of ordinary rights. And the same consequences, even though reached by other means, will also be found to attach under other systems. Under the British system, recourse to martial law is sometimes, although rarely, sanctioned beforehand by statute (*h*). In default of this, it is usual, both in view of some uncertainty in the law and also for the purpose of preventing vexatious suits that might otherwise be brought (*i*), to pass subsequently an Act of Indemnity, indemnifying all persons for acts done *bonâ fide* in the suppression of hostilities or for the public defence, and confirming sentences passed by the military tribunals (*k*).

So far we have touched only on the application of martial law in the home State and by the territorial Power. But a martial law, although of a somewhat different character, may also be applied, in time of war, in the territory of the enemy State and by a belligerent invader. This resembles the former in so far as it has the effect of suspending the ordinary law and ordinary legal rights, in all that relates to the war; but differs from it in so far as it depends wholly on the will of the invader, subject only to such limitations as may be imposed by custom or convention and regard for [illegible]

There is also a further distinction between each of those kinds

[illegible] which [illegible] ascertainable [illegible] and always [illegible] 4 [illegible] 141, &c. [illegible] (1901) A.C. [illegible]

(*c*) [illegible] A. C. 77; [illegible] A.C. [illegible] 1907, A. C. 93, 161.

(*d*) See by way of example, 13 Geo. III. c. 117; 3 & 4 Will. IV. c. [illegible]

(*e*) And sometimes also for the purpose of providing compensation to innocent persons in respect of damage caused by justifiable acts.

(*f*) Such Acts were passed [illegible] Cape Colony in 1900 and 1902; and in Natal in 1900, 1901, and 1908.

of "martial law" and what may be called "military law;" meaning thereby that special body of rules which each State provides for the governance of its armed forces (*l*). But "military law" has no international significance, except in so far as, between the signatories of the Hague Convention, No. 4 of 1907, it is required to conform to the regulations annexed to that Convention (*m*).

General Notes. *The Effect of War on the Legal Rights and Relations of Individuals.*—The outbreak of war affects not only the legal relations of States, but in some measure also the legal rights and relations of individuals. Its more important effects, in this connection, are as follows:—(1) It suspends, in all that pertains to the conduct of hostilities and subject to the limitations imposed by custom and convention, the operation of the ordinary law and the applicancy of rights thereunder, in favour of certain forms of war law. (2) It was formerly held to confer, and although now restricted by policy and usage it still confers in case of necessity, a right on the part of a belligerent to expel from territory belonging to or occupied by him both enemy subjects and others whose presence he may deem inimical to his safety (*n*). (3) It was formerly held to confer, and, within the limits described hereafter, it still confers, on each belligerent a right to sequestrate or confiscate certain kinds of enemy property found within his territory. (4) It confers a right of capture over enemy property found on the sea and not protected by the neutral flag; and also over neutral property embarked in undertakings which a belligerent is entitled to restrain. (5) Finally, it is commonly attended, although to a degree which varies greatly in different systems, by a prohibition of commercial intercourse between the subjects of the respective belligerents; which again involves either a suspension or an abrogation of existing obligations, as well as an interdiction of subsequent dealings so long as the war continues. Some of these consequences have been already touched on; others will be considered hereafter. For the moment we are only concerned with the effects of war in suspending, at certain points, the ordinary territorial law in favour of certain forms of what, in default of a more appropriate term, we may call war law.

Kinds of Law applied in War. The conduct of war between two or more States, and the exceptional conditions to which it gives rise, necessarily involve some derangement of the ordinary law. In the first place, the members of the armed forces on either side are subject to their own military law; although this applies also in time of

(*l*) See Manual of Military Law, I[illegible] and, as regards sea warfare, H. C., [illegible] *et seq.*; and *Tilla Jacky, The Invader of Natal* (1907, A. C. 93, 461). No. 10 of 1907, Art. 20.

(*m*) See H. C., No. 4 of 1907, Art. 1. (*n*) See pp. 60, 265, *infra*.

peace, and has no international bearing except that already noticed. In the second place, the exigencies of war commonly involve an assumption of exceptional powers, not warranted in time of peace, over both the persons and property of private individuals that are found within its range, even though such persons are unconnected with the armed forces on either side. And this may arise either in the home territory, as between the territorial Power and those subject to its jurisdiction; or in the territory of an invaded State, as between the invader and persons resident or found therein. Finally, there are the laws and usages of war, now largely codified by Convention, which regulate the conduct of war between the parties, and which impose conditions and restrictions to which both martial law and military law are required to conform.

Martial Law in the Home Territory. Martial law, despite the name, is not strictly a form of law, but an extra-legal state or condition, under which the ordinary law and ordinary rights are replaced, so far as public defence or necessity may require, by the action of the military or some other summary authority. But in order to impose some limit on this, it is usual to intimate in more or less general terms the nature of the rules or discipline that will be enforced; whilst in order to ensure that it shall be applied with sufficient deliberation and regularity, its administration is usually deputed to courts which are styled Courts Martial; although these Courts are in fact constituted by military officers, proceed by summary methods, and do not strictly fall within the category of regular courts. Such a condition of things is commonly inaugurated in European countries by the proclamation of "a state of siege"; whilst under the British and American systems it is usually established by a proclamation of martial law, the effects of which have already been described. Martial law in this aspect is mainly a matter of municipal concern, though it has a certain international bearing in so far as it may affect the subjects of other States who come within its range (*a*).

Martial Law as applied in an Invaded [illegible]. When the territory of a belligerent is invaded by the other, the territorial law will not cease to apply as between the invaders and the inhabitants of the territory invaded; whilst even as between the latter its operation [illegible] will be suspended owing to the fact of invasion. [illegible] in such circumstances it is the practice for the invader, both with a view to the safety and the success of his operations and with a view to [illegible] against [illegible] condition of lawlessness which [illegible] to obtain and enforce martial law. This, the [illegible] described, has, of course, no [illegible] basis [illegible] either during or after the war could [illegible] to [illegible] between the invader and the [illegible] Power, the subjects of [illegible] appeal to the civil [illegible] invading [illegible] State. Hence martial

(*a*) See p. 267, *ante*, as to Martial Law in Ireland, 1920–21.

law, in this sense, has been described as being "neither more nor less than the will of the general who commands the army" (*q*); the mere presence of an invading army amounting to notice that it will be brought into force. Nevertheless, a commander who enforces martial law ought, so far as possible, to lay down distinctly the regulations under and limits within which it will be carried out; whilst all punishments inflicted thereunder ought to be inflicted only after enquiry and sentence by a military court. Such regulations must in their details necessarily depend largely on local conditions and needs, and especially on whether the territory in question is under actual occupation or not. But in any case they must not conflict with the laws and usages of war, as ascertained by custom and convention. Subject to these conditions, martial law of this kind will apply equally to all persons found within its range, irrespective of their nationality (*s*). The exercise of such martial authority will come to an end on the termination of hostilities (*t*).

The Laws and Customs of War.—The laws and customs of war comprise a body of rules originating in custom, but now for the most part embodied in international conventions (*u*). These purport to regulate the conduct of war both by land and sea. As regards land warfare, they prescribe the qualifications of belligerents, regulate the methods of conducting hostilities, prescribe rules as to the treatment of prisoners of war and the sick and wounded, regulate the seizure of property and the treatment of the civil population, define the rights and responsibilities incident to military occupation, and regulate also the non-hostile relations of the belligerents. As regards sea warfare, they cover much the same ground, having regard to the different conditions involved; although in this case with much greater attention to the rights and duties of neutrals. Both these branches of the laws of war will come under consideration hereafter (*x*).

(*q*) This was said by the Duke of Wellington in the House of Lords: see Hansard, 3rd series, cxv. 502; cited Holland, War on Land, 14.

(*s*) But as to the diplomatic agents of neutral Powers, see vol. i. 305; and as to the position of hostile subjects in relation to the invader, vol. i. 204, and vol. ii. p. 266.

(*t*) On the subject generally, see Holland, War on Land, 14–15.

(*u*) See p. 3.

(*x*) See Exercises, I. and II.

ENEMY PERSONS AND PROPERTY FOUND WITHIN THE TERRITORY OF A BELLIGERENT AFTER THE OUTBREAK OF WAR.

BROWN *v.* THE UNITED STATES.

[1814: 8 Cranch, 110; Scott, 486.]

Case. This was a suit relating to a cargo of timber belonging to British subjects, which had been originally shipped on board an American vessel for transport from the United States to England. The departure of the vessel was first delayed by an embargo, and next by the outbreak of war between Great Britain and the United States (*a*). Thereafter the timber was unloaded and deposited in a navigable creek (*b*) under the custody of the owner of the vessel. Subsequently the agents of the owners of the timber purported to sell it to the plaintiff, who was an American citizen; but proceedings were taken by the United States authorities, at the instance of the owners of the vessel, to procure its condemnation as enemy property found within the jurisdiction of the United States after the commencement of hostilities, and hence as liable to condemnation as prize of war. In the District Court condemnation was refused; on appeal to the Circuit Court this judgment was reversed; whilst on appeal to the Supreme Court it was held that the property was not in the circumstances liable to confiscation, and a decree of restitution was accordingly made.

Judgment. In the judgment of the Court (*c*), which was delivered by Marshall, C.J., the material question was stated to be whether the vessel could be considered, assuming that the property in it had not been vested in the plaintiff by the sale to the plaintiff, could be considered as prize of war. There being nothing either in the circumstances

(*a*) In June, 1812.

(*b*) Such a creek is, in law, considered as being within the body of the country.

(*c*) From which, however, a minority of the Court, including Story J., dissented.

of the case or in the local situation of the timber to distinguish this from any other British property found on land after the commencement of hostilities, the question would be treated as governed by the same general rule.

With respect to the power to seize such property, it was conceded that war gave to the Sovereign full right to take the persons, and to confiscate the property of the enemy, wherever found. The mitigations of this rigid rule which the humane policy of modern times had introduced in practice might affect the exercise of this right but could not impair the right itself (*d*). Hence, if the sovereign authority chose to bring that rule into operation, then the judicial department must give effect to it; but until that will was so expressed the Courts had no power to condemn. The questions to be decided, then, were: (1) Could enemy property found on land at the commencement of hostilities be seized and condemned as a necessary consequence of a declaration of war? (2) If not, was there, in the present case, any legislative Act that authorized such seizure and condemnation?

With respect to the effect of a declaration of war, the now universal practice of forbearing to seize debts and credits and the recognition of their revival on the restoration of peace seemed to show that war did not in itself work a confiscation, but merely conferred a right of confiscation. Between debts contracted on the faith of the territorial law and property acquired in trade on the faith of the same law there did not appear to be any rational distinction. Such mitigations in practice, however, did not affect the essential question, whether the declaration of war itself caused enemy property within the jurisdiction to vest in the Sovereign without more; or whether it merely gave a right of confiscation, the exercise of which depended on some further manifestation of the national will. After a review of the principal writers on the *jus belli*, the Court came to the conclusion that the modern rule was that tangible property belonging to an enemy and found in the country at the commencement of war ought not to be immediately confiscated. Almost every commercial treaty, moreover, contained stipulations for the right to withdraw such property.

(*d*) For a criticism of this statement and position, see Moore, Digest, vii. 313.

This appeared to be incompatible with the idea that war in itself vested such property in the belligerent government. Hence, it might be considered as the opinion of all who had written on the *jus belli* that, although war gave a right to confiscate, it did not in itself operate as a confiscation of the property of an enemy.

Proceeding then to consider the matter from the point of view of the Constitution of the United States, it was pointed out that in expounding that Constitution a construction ought not lightly to be admitted, which would give to the outbreak of war an effect in the United States which it would not have elsewhere, or which would fetter the Government in applying to the enemy the same rule that he applied to citizens of the United States. Both the provisions of the Constitution and other laws bearing on the subject appeared to be in conformity with the general rule previously indicated. The question of confiscation, then, was one to be determined by legislative department, which could modify the law at will, rather than by the executive and the judiciary, which had to follow the law as it was; and in the present case there was no Act which went to show that Congress had, in fact, directed the confiscation of enemy property found within the jurisdiction at the commencement of the war.

Directly, this case decides no more than that enemy property found on land within the United States after the outbreak of war cannot be confiscated without a legislative enactment authorizing such confiscation; and that the mere act of the Legislature in declaring war is not such an authority *per se*. Incidentally, no doubt, it was ruled (1) that, according to the law of nations as interpreted by the Court, the outbreak of war between two states, although it does not of itself work a confiscation, yet confers on the sovereign authority in each State a right to take the persons and to confiscate the property of its enemies found within its jurisdiction, even though the humane policy of modern times may mitigate the exercise of this right in practice; and (2) that the executive authority alone is to exercise this right and to direct confiscation, so that the judicial department will have no option but to give effect to it. The second proposition is in itself unquestionable, as being a statement of American or English law, and of principles acted on in other systems; although its legality

(1) See Wheat. Digest, vii. 2, 8; but see Westlake, Digest, 1887, p. 45.

of such a proceeding might, no doubt, in a case where the facts admitted of this, be questioned in the courts of other countries.[e] The first and more important of these propositions—although frequently challenged and although it must be admitted that the practice of exemption has grown in strength since the time at which the judgment was delivered—is still believed to hold good as a formal statement of the existing law.[f] As regards persons, however, the right of seizing and detaining enemy persons found within the jurisdiction, although still exercisable in the last resort and as a matter of technical right, is, as we shall see, now controlled in its exercise at any rate as regards persons having no military or other status specially connecting them with the war by a long course of usage, which some writers conceive to have become obligatory, but which, in any case, could not be violated without entailing considerable opprobrium. As regards property, again, the right of confiscation, although not wholly abandoned, has become—as indeed it was pronounced to have become in the later decision of the Supreme Court in *Hamper* v. *Abbott*[g] (6 Wall. 532)—"a naked and impolitic right condemned by the enlightened conscience and judgment of modern times"; as a right, in fact, which does not ensue from the mere fact of war, and which would not now be resorted to except as "an ulterior measure of government" expressly directed by the sovereign authority and designed to meet some exceptional situation.[h]

The English law on this subject appears in the main—and notwithstanding some conflict of authority and some special enactments in favour of foreign merchants[i]—to agree with the view adopted by the American Courts, and to be subject to the same limitations as regards its practical exercise[k]; although the exercise of any discretionary power in the matter would under the British system rest with the Crown unless Parliament otherwise provided.[l] With respect to debts, however, it was, as we shall see, held in *Wolff* v. *Oxholm*[m] (6 M. & S. 92) that the confiscation of these by a foreign Government was contrary to the law of nations *per se*; from which it is to be inferred that such a proceeding would be equally illegal if resorted to by the British Government. But, subject to this exception, and where not waived by treaty, the right remains as a formal right, although it would not now be resorted to save in

[e] As indeed occurred in *Wolff* v. *Oxholm* (6 M. & S. 92); see p. 56, *infra*.

[f] At any rate, as interpreted by the American and British Courts, as to other countries, see p. 52.

[g] As modified, however, in this case to debts.

[h] As where resorted to by way of reprisal.

[i] See Phill. iii. 176.

[k] As to prize, see Hall's Letters upon War and Neutrality, 58 *et seq.*; and as to property, *Re Stuart* (3 Ves. Jun. 124; compare *Wolff* v. *Oxholm*, 3 T. R. 726; Stephen, Com. ii. 12.

[l] See *Re Stuart*, 4 Sp. 317; compare also Blackstone, Com. ii. 20, where the right of [illegible] is [illegible] to good [illegible] into the [illegible] and without [illegible] Vattel, iii. 11, § 3.

[m] 57

exceptional cases *m*. In this form the British-American view will not, as we shall see, be found to differ greatly in its practical results from the nominally more liberal view adopted by European jurists (*o*): private property enjoying under both systems a virtual immunity from confiscation.

WOLFF *v.* OXHOLM.

(1817: 6 M. & S. 92.)

Case. The plaintiff was a naturalized British subject, resident and carrying on business in England in partnership with others. The defendant, a Danish subject resident in Denmark, was, in 1800, indebted to the former in the sum of 2,101*l.* 7*s.* 5*d.* A suit to recover the debt was afterwards instituted in Denmark; the proceedings being conducted in the name of an assignee of the plaintiff, and the defendant also instituting a cross suit. In 1807, whilst these suits were pending, war broke out between Great Britain and Denmark. In August, 1807, an ordinance was issued by the Danish Government, by which all ships, goods, money and money's worth, of or belonging to English subjects, were sequestrated; whilst in September, 1807, all persons were required to transmit an account of the debts due to British subjects, of whatsoever nature, and to pay the whole of such amounts into the Danish treasury, under pain of being proceeded against. In compliance with the ordinance, the defendant gave notice of the debt owed by him to the plaintiff, and ultimately paid over the amount to the Danish treasury *n* and obtained a receipt; whereupon the suit depending between the plaintiff's assignee and the defendant was quashed. In 1814, the defendant, being then in England, was arrested and held to bail in a suit brought in the Court of King's Bench to recover the debt. In the result, it was held that the proceedings in Denmark and the ordinance in question constituted no defence to the action.

m See *The Gerasimo*, 11 Moore P. C. 179; and Hall, 351–355.

n Although this was not till 1812, and then at a rate of exchange much below that current at the time of payment.

Judgment. In the judgment, which was delivered by Lord Ellenborough, C.J., it was pointed out that the Danish ordinance stood single and alone; and that it was not supported by any precedent nor adopted as an example in any other State. The ordinance itself did not appear to have been followed up by any measure of compulsion; and although the Commissioner had notice of the debt as early as 1807 the money was not paid until 1812. On a review of the older authorities it appeared that the right of confiscating debts contended for on the authority of Vattel was not recognized by Grotius and was altogether impugned by Puffendorf and other writers; that such confiscation was not general at any time; and that no instance of it, except the ordinance in question, was to be found for more than a century. Under these circumstances, the judgment of the Court would be pregnant of mischief to future times if it did not declare that the ordinance and payment under it furnished no defence to the present action, either in themselves or by aid of the proceedings in the Danish Court. The parties went to that Court expecting justice under the existing law, and were not bound by the quashing of their suit in consequence of a subsequent ordinance, which was not conformable to the usage of nations, and which neither they nor the present Court were bound to regard.

This decision rests broadly on the ground that the confiscation by the Danish Government of debts due to British subjects was a violation of the law of nations; and that the proceedings founded thereon in the Danish Courts were not, therefore, binding in the courts of other States [*a*]. The decision itself has been the subject of much conflict of opinion. On the one hand, it is commended and approved as being more strictly in harmony with existing usage than the decision in *Brown* v. *The United States* (8 Cranch, 110 *et seq.*) and the wish expressed that the Courts may, if occasion serves, see their way to apply its principle to tangible as well as to intangible property [*b*]. On the other hand, it is said that the judgment is based on statements that are historically

[*a*] See also *Hoffman* v. *Lanusse*, 2 Martin's N. Caroline Rep. 83; Scott, 481, where the view is taken that the legislative exoneration of a debtor in such a case only has the effect of destroying the local remedy for the debt, but does not affect the debt itself, which may, when circumstances allow, be still sued for and enforced in foreign courts.

[*b*] See p. 52.

(*d*) Westlake, ii. 44.

erroneous *f*: that the conclusions deduced from the writings of the publicists are not, in fact, warrantable: and that the high authority of Story and the United States Courts was ignored: in view of which it is opined that if the case were to present itself before a higher Court the decision would be reversed. It is further suggested that it was wrong to penalize a foreigner for obeying the laws of his own country: and that in such a case the debtor ought to be regarded as discharged, so long as the amount due was actually paid, and was paid under compulsion and without intent to prejudice the original creditor *g*. The decision is, no doubt, at variance with the decisions of the American Courts, which recognize an ultimate right of confiscation as regards all forms of enemy property found within the jurisdiction, even though they regard the exercise of such a right as impolitic *h*. If, moreover, the English law still recognizes an ultimate right of confiscation as regards property that is tangible *i*, it is difficult to see on what ground of principle debts or intangible property should be exempted *k*. Nevertheless the decision until reversed must be taken to represent the rule that, so far, obtains in English law; whilst its existence may, if the occasion should arise, afford the English Courts an opportunity of extending in law to other forms of private property of an innocent character that immunity from confiscation which they virtually enjoy in practice.

General Notes. *Enemy Persons found within the Territory of a Belligerent*: 1. *The Right of Withdrawal.* It was one of the consequences of the earlier view of the relation of war, that the subjects of one belligerent who were found within the territory of the other, on or after the outbreak of war, were liable to seizure and detention and their property to confiscation. This was first relaxed in the case of foreign merchants, who, sometimes by treaty and sometimes by municipal law but subject to conditions of reciprocity, were allowed to withdraw themselves and their property within a given time after the commencement of hostilities. Next, the scope of such privileges appears to have been enlarged so as to include

the event of war, or the contrary [illegible] that the confiscation of such interests must be deemed to be [illegible] the risks implied by the strict laws of war. [illegible] that [illegible] must be applied equally to property of a tangible or of an intangible kind. [illegible] Wheaton's Int. Law, 12th ed., 157. As to [illegible] the [illegible] title such property must be [illegible] vested [illegible] but [illegible] [illegible] [illegible]

other enemy subjects. Finally, here, as in other cases, a practice originating in treaties made between particular States gradually gave rise to an international usage, which in time became an obligatory custom. Such a custom, at any rate, appears to have established itself in the course of the 18th century (*m*). By virtue of this custom the subjects of one belligerent found within the territory of the other on the outbreak of war were allowed to depart freely within a period reasonably sufficient for the arrangement of their affairs and compatible with public safety; subject, however, to an exception in the case of persons whose detention might be a matter of political or military necessity (*n*). And this right of withdrawal may still be taken advantage of in those cases where the later and the more liberal practice of allowing enemy subjects to remain is not observed. But it will not extend to enemy persons who outstay the period limited for withdrawal, or who voluntarily enter the territory afterwards (*o*). The only modern instance of the violation of this custom occurred in 1803, when British subjects found in France were arrested and some of them detained until 1814 by order of Napoleon; but this proceeding was resorted to rather as a measure of reprisal for an alleged wrongful seizure of French merchant vessels, and was even then generally reprobated (*p*).

(iii.) *The Right to Remain.* Already in the 18th century, however, we notice the growth of a more liberal practice under which enemy subjects were sometimes allowed to remain during good behaviour. This was at first probably rather tolerated than conceded, although on some occasions officially authorized (*q*); whilst, later, we find such a right occasionally conferred by treaty (*r*), or even by municipal law (*s*). In the increased intercourse of modern life and commerce the newer usage was found to be conducive to the interests of both parties; with the result that it is now often followed irrespective of treaty. At the same time having regard to the varying practice of States in recent wars (*t*), it cannot, so far be said [illegible] have

(*m*) Although treaties still continued, probably for the sake of greater security, or sometimes with a view to an enlargement of the right.

(*n*) As to persons belonging to the armed forces of the enemy, see reply of the Attorney General to a question asked in the House of Commons on the 25th February, 1909; cited H. Holland, Letters on War and Neutrality, p. 101; also Hall, 396. Some writers, such as Calvo, extend this exception to individuals returning for military service in their own country (see *Le Droit International*, iii. 37); although the British practice would not appear to sanction this.

(*o*) As in the case of [illegible] subjects have been ordered to withdraw.

(*p*) Taylor, 461; Westlake, ii. 42.

(*q*) As in the official declarations made by the British Government on the outbreak of war with France and Spain, respectively; referred to in Taylor, 462, and Woolsey, ii. 43.

(*r*) As by treaty of 1795, made between Great Britain and the United States.

(*s*) As by an Act of Congress of 1798.

(*t*) In the war of 1854, Russian subjects were allowed to remain, left in Great Britain, and France. In the war of 1874, German subjects were

come obligatory; whilst in any case it is subject to qualification where the expulsion of enemy subjects, whether as individuals or as a class, is deemed necessary from the standpoint of public policy or military necessity. Where enemy subjects are allowed to remain, it would seem to follow that they are free from those civil disabilities which commonly attach to alien enemies under the municipal law (*u*); although they are subject to such regulations, including registration, as may be prescribed in that behalf, and to the same restrictions as regards trading with the enemy as may attach to other residents (*v*).

Enemy Property. i. *Public Property.*—Property belonging to the enemy State, which a belligerent finds within his jurisdiction at or after the outbreak of war, and which is not protected by some special immunity (*x*), is liable to seizure. So public vessels, arms, munitions of war and supplies, railway plant and the like, together with money and realizable securities, belonging to the enemy State, may be lawfully seized. Land is rarely the subject of ownership by a foreign State, save perhaps for diplomatic and consular residences which would in any case be exempt; but if land were so owned, then it would also appear to be equally liable to appropriation (*y*).

ii. *Private Property of Immediate Use in War.* Property belonging to enemy subjects which is of a kind likely to be of immediate use in war, and which is found within the jurisdiction at or after the outbreak of hostilities, is also liable to seizure; although, on the analogy of the rules now governing the treatment of similar property in hostile territory, it seems that the seizure would now be subject to an obligation of restitution or indemnity on the return of peace (*z*). This right would also extend to

at first allowed to remain in France so long as they furnished no ground for complaint, although for new admissions express permission was required; whilst, subsequently, all enemy subjects were required to withdraw from the department of the Seine, this proceeding being justified by military necessity. In 1897, Turkey, on the outbreak of war with Greece, decreed the expulsion of all Greek subjects resident within the Ottoman dominions. In the Spanish-American war of 1898, Spanish subjects were expressly authorized to remain in the United States, although admonished that they would be under the effect of suspicion. In the South African war of 1899, many British subjects were expelled from the territories of the two republics. In the Russo-Japanese war of 1904, Japanese subjects were expelled from the Russian possessions of the Far East, although allowed to remain in other parts; but Russian subjects were allowed to remain in Japan on condition of registration.

(*u*) Although this is not altogether clear in English law: see p. 90, *infra*.

(*v*) See p. 24, *supra*; and, on the subject generally, Hall, 387 *et seq.*, and Westlake, ii. 41 *et seq.*

(*x*) Such as debts due by one State to the other, see p. 44, *supra*; and as to other cases of immunity, p. 111, *infra*.

(*y*) See Latifi, 20; and as to the question of debts, *ibid.* 24; although the right of appropriation would not, it is conceived, apply where a belligerent was merely in military occupation: as to which, see H. iii. 415 *et seq.*, and Phill. iii. 847.

(*z*) See H. R. 53; and Latifi, 41 *et seq.*

enemy merchant vessels whose construction indicated that they were intended to be converted into ships of war (*a*).

(iii.) *Private Property of Other Kinds.* The treatment of other kinds of enemy property that may be found in a like situation has been the subject of different usages at different times, and is still the subject of a marked difference of opinion. Looking, first, to the practice of States, one may probably say that down to the 16th century all private property of whatever kind having an enemy character and found by a belligerent within his own territory was subject to confiscation. After this, however, we notice a gradual relaxation of the earlier practice, dictated, no doubt, by a perception of common interest. As regards land, sequestration was gradually substituted for confiscation; whilst as regards moveable property, the practice of confiscation was greatly mitigated, first, by the bestowal on enemy subjects, either by treaty or municipal law, of a right of withdrawal, which was invariably coupled with a right to remove or dispose of their property, and next, by the formation of a usage to that effect apart from treaty. Nevertheless, down to the end of the 18th century instances of the confiscation of moveable property occur in a variety of cases not covered by treaty (*b*). But as the more liberal practice of allowing enemy subjects to remain during good behaviour grew in strength, this necessarily carried an immunity from interference with their property on the part of such as remained; whilst a like immunity could scarcely be refused to non-residents, who were less a source of danger than resident enemies (*c*). So ultimately all private property, not being of a noxious kind, came to enjoy a virtual immunity from confiscation; and this whether it consisted of land or goods, or property of an incorporeal nature, such as debts and credits; although enemy merchant vessels found in a belligerent port at the outbreak of war remained liable to seizure until the middle of the 19th century (*d*). Subject to this exception, we find as from the commencement of the 19th century, only two instances of confiscation. One of these occurred in 1807, when the Danish Government issued the ordinances already referred to, sequestrating and ultimately confiscating the property of British subjects found in Denmark; a proceeding, however, which was really a measure of reprisal (*e*). The other occurred in 1861, when the Southern Confederacy issued a decree confiscating all property of whatsoever nature, except public stocks and securities, held by alien enemies since the 1st May, 1861 (*f*). But this, again, was an exceptional measure, resorted to by a rebel Government by way of retaliation against the parent State, whilst a proposed extension of it, which would have affected foreign interests, was the subject

(*a*) See H. C., No. [illegible] of [illegible] Sess. 5.

(*b*) See Hall, 433; Westlake, [illegible] 43.

(*c*) See Westlake, [illegible] 42.

(*d*) [illegible], p. 150.

(*e*) [illegible], p. 56.

(*f*) As to the effect of this in municipal law, see *Dicey* v. *Peters*, [illegible] 9 C. B. 795; Scott, 521.

...th of protest and general condemnation (*g*). Passing, next, to ...gal theory we note a marked divergence of opinion. According ... one view, there is already an obligatory custom of exemption. This is the view commonly adopted by most European writers. But this conclusion must probably be taken, in the quarters from which it proceeds, as being implicitly subject to such qualifications as may be imposed by military necessity (*h*); or, in any case, as being subject to such qualifications as may be imposed by the requirements of public safety or the laws of reprisal (*i*). According to the other view, war, although it does not of itself work a confiscation of property in this situation, yet confers on the sovereign authority a right to decree its confiscation if this should be found necessary. This may be said to represent generally the Anglo-American view, both as a matter of municipal law and as an interpretation of international law (*k*). In practice, however, both systems recognize the exemption of private property as a policy that ought to be followed save in exceptional cases. The difference in effect, then, between these two views does not appear to be very great. One recognizes exemption as obligatory, save in cases of necessity or emergency; the other recognizes a technical right of seizure, but subject to a general policy of exemption. In their practical application each would probably sanction the confiscation of private property in exceptional circumstances, such as public necessity, or by way of reprisal. But outside such cases, each recognizes its immunity (*l*).

THE EFFECT OF WAR ON COMMERCIAL RELATIONS.

I. EXISTING TRANSACTIONS.

1. SUSPENSION.

JANSON *v.* DRIEFONTEIN CONSOLIDATED MINES, LTD.

1902: A. C. 484.

Case. The respondents on appeal, who were the original plaintiffs, were a mining company incorporated under the Laws of the

(*g*) See p. 13, *n.* (*g*).
(*h*) See Lalib. 49 (*c*).
(*i*) See pp. 54, 55, and [illegible] on the exceptional case of [illegible] English Law, p. 57.
(*k*) On this subject generally, see Hall, Int. Law, 2d ed. 267, and ii. 3[illegible] and Lalib. 39 (*c*).
(*l*) [illegible] No. 1.

South African Republic, and having a head office there, but having also a London office, whilst most of the shareholders were resident outside the Republic. The company had, in August, 1899, insured with the appellant and other underwriters a parcel of gold during its transit from the mine near Johannesburg to the United Kingdom; the risks insured against including, *inter alia*, "arrests, restraints, and detainments of all kings, princes, and peoples." On the 2nd October, 1899, the gold in question was seized during its transit by the Government of the South African Republic. It was admitted that at the time of the seizure war was imminent; and that on the 11th October war in fact broke out between Great Britain and the Republic. Subsequently, but before the war had come to an end, the company commenced an action on the policy; the defendant having agreed not to set up the plea of alien enemy, which would otherwise have debarred the company from suing in a British Court during the war (*a*). The action was originally brought before Mathew, J. (1900, 2 Q. B. 339), who held that the defendant was liable; and this decision was affirmed by the Court of Appeal (1901, 2 K. B. 419). On appeal to the House of Lords, it was held that inasmuch as the insurance had been effected and the loss incurred before the actual outbreak of war, the respondents were entitled to recover; and this, even though the loss was incurred by a seizure made in contemplation of war, and in order to use the gold in support of the war.

Judgments. Judgments were delivered by Lord Halsbury, L.C., Lord Macnaghten, Lord Davey, and Lord Lindley.

Lord Halsbury, L.C., in his judgment, held, in effect, that inasmuch as the policy in question was entered into and the loss incurred before the actual outbreak of war, it could not be regarded as contrary to public policy, as defined by preceding cases, even though war was imminent at the time. The Courts were not at liberty to invent new heads of public policy. The principle on which commercial intercourse must cease on war only applied where the heads of the respective States had actually created a state of war. If war ensued, such a contract was suspended during

(*a*) As to the legality of this, see p. 65, *post*.

to the fact that an alien enemy could not sue thereon during the war in the Courts of either country; but the rights under it were unaffected, and when the war was over the remedy in the Courts of either country was restored. The earlier writers on international law used to contend that a public declaration of war was essential; but this was not the existing view. At the same time it was essential that the hostility should be the act of the nation which made the war. No amount of "strained relations" would affect the subjects of either country in their commercial relations or other transactions. Trading with the "King's enemies" was, of course, illegal; and so was an undertaking by contract to indemnify "the King's enemies" against loss inflicted by the King's forces; but the words "King's enemies" were an essential element in the proposition, and to substitute the words "aliens who might become the King's enemies" would be to introduce an altogether new principle. Moreover, even if it were now competent to a Court to consider the question whether a contract such as the present was contrary to public policy, it would seem that the answer should be in the negative. To hold that such contracts were affected by the mere imminence of war would be to prescribe a test, which would be at once difficult in its application and extremely harmful in its consequences on the free commercial intercourse between nations.

Lord Davey, in his judgment, said that three rules had been established under the common law. The first was that the King's subjects could not trade with an alien enemy without the King's licence. Every contract made in violation of this principle was void, and goods which were the subject of such a contract were liable to confiscation. The second was a corollary of the first, but rested on distinct grounds of public policy. It was that no action could be maintained against the insurer of enemy's goods or ships against capture by the British Government. One of the most effectual instruments of war was the crippling of the enemy's commerce; and to permit such an insurance would be to relieve the enemy of his losses, and would, therefore, be detrimental to the interests of the insurer's own country. This principle applied even where the insurance was made prior to the commencement of hostilities and was thus for a legal in its inception; and whether

the person claiming on the policy was a neutral or a British subject, so long as the insurance was on behalf of an alien enemy. The third rule was that if a loss had taken place before the commencement of hostilities, the right of action on a policy of insurance was suspended during the continuance of war, but revived on the restoration of peace. In the present case, this third rule would have constituted a defence to the present action; but it had been waived by agreement. He had some doubt as to whether it was competent to the parties to take this course, for the reason that the objection (*b*) was based on considerations of public policy, and the Courts would therefore be bound to take notice of the company's inability to sue. But peace having now been established, he did not desire to make this point a ground of judgment. As regards each of these rules, however, the time when the rule came into operation was the actual commencement of hostilities. The attempt to extend their operation to a case where war had not occurred, but was merely imminent, appeared to be wholly unsupported by authority. Such an extension would tend to interference with lawful contracts and commercial pursuits. Nor could the Courts well decide a question as to whether war was imminent or not.

Directly, this case merely decides that the legal effects of war on commercial relations will accrue only as from the time when the war actually commences. But beyond this, the judgments re-state and affirm, with all the authority that attaches to the decisions of a Court of final appeal, the general rule of non-intercourse; and, more especially, its effects on contracts or other transactions subsisting between subjects of the respective belligerents at the time of the outbreak of war (*c*). The rule of non-intercourse came under consideration in the same war in the case of *The Mashona* (10 Cape Times L. R. 150), where, amongst other things, it was laid down that one of the immediate consequences of the outbreak of hostilities was the interdiction of all commercial intercourse between the subjects of the States at war without the licence of their respective governments, and that this prohibition applied to all persons domiciled within the belligerent States. In other words, all commercial intercourse without licence between persons "living on the line of war" is prohibited

(*b*) That the plaintiff was an alien enemy.

(*c*) The legal position of contracts and the question of trade domicile are also touched on in the judgment of Lord Lindley, [illegible] p. 26.

That is "domiciled in the country" of the respective belligerents. Cf. *Ex parte Boussmaker*, 13 Ves. 71; *Antoine v. Morshead*, 6 Taunt. 237; and [illegible] p. 80.

The more important applications of this rule in English law are shortly these: (i.) Contracts or other transactions duly entered into before the war between persons who, whatever their nationality, are divided by the line of war, are, in general, merely suspended during the war, as regards the right to performance and the right of suit. Nevertheless, even such transactions will be abrogated (1) if they enure to the aid of the enemy (*e*); or (2) if they cannot be carried out without involving some dealing with the enemy (*f*); or (3) if they are in their nature incapable of suspension (*g*). (ii.) On the other hand, transactions which are entered into after the commencement of the war, and between persons divided by the line of war, whether in the nature of trading ventures proper (*h*), or contracts of any other kind (*k*), are in general illegal and void; whilst the same invalidity will attach to contracts which, even though not made with alien enemies, are yet in furtherance of such illegal trade or intercourse (*l*). But the rule prohibiting commercial intercourse will not apply where the transaction in question is entered into between persons who, although otherwise enemies, are not in fact divided by the line of war (*m*). Nor does it apply to transactions which are specially privileged or excepted; such as licensed trade and contracts incidental thereto (*n*), or contracts for necessaries entered into by British subjects held as prisoners by the enemy (*o*).

With respect to existing transactions and relations, the primary rule which applies to all cases not excluded on some special ground (*p*) is that they are suspended during the war both as to their legal effects and, in strict law, as to all rights of suit thereon, but revive on the restoration of peace. So in *Ex parte Boussmaker* (13 Ves. 71), where an application was made on behalf of certain foreign creditors of an English bankrupt to be admitted to prove against the estate—a claim previously denied to them, on the ground that they were alien enemies—the claim was allowed by Lord Erskine, L. C., on the ground that although a creditor who was an alien enemy could not sue after the outbreak of war or during its continuance, yet if the contract out of which the debt arose had been made before the war—as was there the case—the right to sue would revive on the return of peace; from which it followed that any dividend to which the creditors were entitled could not be confiscated or divided amongst the other creditors, but must be kept in hand for the benefit of the latter after the restoration of peace.

(*e*) *Potts* v. *Bell* (*infra*, p. 77).

(*f*) *Wells* v. *Williams* (*infra*, p. 80); *Kershaw* v. *Kelsey* (*infra*, p. 78).

(*g*) *Esposito* v. *Noble* (*infra*, p. 80).

(*h*) *Hunter* v. *Marshall* (*infra*, p. 82).

2. Abrogation.

a. *As in Aid of Enemy.*

FURTADO *v.* ROGERS.

1802; 3 Bos. & P. 191.]

Case.] In 1792 an insurance was effected by the plaintiff with the defendant, as representing an English company, on a French vessel, the "Petronelli," on a voyage from Bayonne to Martinique. In 1793 war broke out between Great Britain and France, in the course of which Martinique, with all the shipping in its ports, including the "Petronelli," was captured by the British, and the vessel condemned as enemy property. After the conclusion of the war the plaintiff brought an action to recover the amount of the insurance on the vessel. In the result, it was held that such a contract was at common law abrogated by war, on the ground that it involved an indemnity to an enemy owner for the capture of his property by the State of the insurer, which was inconsistent with the very objects of the war.

Judgment.] In the judgment of the Court of Common Pleas, which was delivered by Lord Alvanley, C.J., it was pointed out that it was not competent to a subject to enter into a contract to do anything which would be detrimental to the interests of his country; and such a contract was therefore as much prohibited as if it had been expressly forbidden by Act of Parliament. It was admitted that if a man contracted to do a thing which was afterwards prohibited by Act of Parliament, he was not bound by his contract [*a*]. On the same principle, where hostilities broke out between the country of the insurer and that of the assured, the former was forbidden to fulfil his contract. With respect to the expediency of such instances, it was only necessary to cite a single line from Brackenbrook, who said: "*hostium periculo in se suscipere quid est aliud quam contra ius naturæ commercia*

[*a*] *Antram v. Anderson*, 1 Salk. 198.

promovere;" and a part of a passage from Valin, who, referring to the previous English practice of permitting such insurances, said that "the consequence was that one part of the nation restored to us by the effect of insurance what the other took from us by the rights of war." Hence, the Court was of opinion that the insurance of enemy property was illegal at common law; and, if this were so, then the fact of the contract having been entered into prior to the war would be of no avail, for the reason that it was equally injurious to the interests of the country. If such a contract were upheld, a foreigner might, prior to the war, insure against all risks of the war. And even though the indemnity might only be paid after the war, yet the enemy would be little injured by captures for which he was sure, at some time or other, to be repaid by the underwriter. Such contracts were therefore illegal for the same reason that commercial intercourse with the enemy was illegal, because they were inconsistent with the very objects of war. Hence, if a British subject insured against captures, the law would infer an exception as regards British captures; whilst, if he expressly insured against such captures, the contract would be void *ab initio*.

Prior to this decision, some doubt had existed as to whether an insurance of enemy property was not valid, provided it had been entered into prior to the outbreak of war. But any such doubt was set at rest by the present decision, which makes it clear that such insurances, whenever entered into, are void as contrary to public policy [*b*]. And the same principle would apply to other contracts or transactions that tend to the assistance or the aid of the enemy, whenever and with whomsoever entered into [*c*]. By 37 & 38 Vict. c. 123, moreover, even the purchase of enemy stock by a British subject is made a misdemeanour [*d*].

[*a*] See also *Bell* v. *Reid*, 1 Dougl. 1 (practices with respect to insurance); 1 Arn. Ins. 6th ed. 136; Phillips, Effect of War on Contracts, T. R. 23; 78 et seq.

[*b*] *Wells* v. *Williams*, 1 Ld. Raym. 282; Cf. *R.* v. *Harvey*, 1 B. & P. 642, 651; *Esposito* v. *Bowden*, 7 E. & B. 763, 650.

b) *As Incapable of Suspension.*

GRISWOLD *v.* WADDINGTON.

[1818; 16 Johnson's Rep. 438; Scott, 504.]

Case.] Prior to the outbreak of war between Great Britain and the United States, in 1812, a commercial partnership had subsisted between Joshua Waddington, an American citizen residing in New York, and Henry Waddington, a British subject residing in London. During the war certain business transactions occurred between Joshua Waddington and N. L. & G. Griswold. After the war proceedings were taken by the latter to recover a balance of account alleged to be due to them in respect of these transactions, for which it was sought to make Henry Waddington, the English partner, liable. In the Court below judgment passed for the defendant; and on appeal to the Court of Errors, this judgment was affirmed on the ground that the partnership between Joshua and Henry Waddington had been dissolved by war.

Judgment.] In giving judgment, Kent, Ch., pointed out that the declaration of war of itself worked a dissolution of all commercial partnerships existing at the time between British subjects and American citizens; and further that by dealing with either party no third person could acquire a legal right against the other, for the reason that one alien enemy could not, in that capacity, make a private contract binding upon the other. The learned judge stated, in effect, that such a conclusion appeared to be an inevitable result of the new relations created by war, and a necessary consequence of the rule which prohibited trade or communication with an enemy. The state of war, in fact, created disabilities, restrictions, and duties, which were altogether inconsistent with the continuance of such a relation. To allow an alien enemy to bind a hostile partner by his contracts, when the latter could exercise no control over them, would be altogether unjust, and when the business of the partnership was thus put an end to, the partnership itself ceased. Having regard, more particularly, to the nature and objects of commercial partnerships, it was contrary to all the rules by which they were governed, that they should

continue after the parties had been interdicted from all communication with each other, and placed in a state of absolute hostility to each other, for there could no longer be that unity of interest or that lawful common aim which was essential to partnership. The commerce carried on by one partner must, in a maritime war, necessarily contribute to the resources and efforts of his country; and, in such circumstances, to allow the other partner to draw a revenue from operations subversive of his own country's interests, would result in a complete confounding of the obligations arising from the law of partnership and the law of war. Nor could the partnership be abridged during the war to business that was harmless, without destroying it. Equally little could it be deemed to continue in a quiescent state during the war, on the terms of each partner not sharing in the profits made by the carrying on of a commerce that was hostile to his country; for that might mean that one might be called on to share in losses without sharing in profits, which would be incompatible with partnership. Each partner was, indeed, entitled to contract and bind the firm; but, as against this, each was also entitled to check and control such action on the part of the other. But if a partnership were allowed to continue in war as between hostile associates this control would be gone. Moreover, each partner being disabled by the war from discharging his duty, or a part of his duty, it would seem that such a disability, whether under the civil or the English law, had the effect of dissolving the relation. As regards notice in the present case the declaration of war was in itself the most authentic and monitory notice, and no other was required. The partnership, moreover, having been once dissolved by the war, could no longer be the foundation of any right of action, except as to matters arising before the war.

The contract of partnership belongs to that class of contracts which are suspended by war. The reason for this is that, where the parties are divided by the line of war and all commercial intercourse between them is prohibited, neither the rights nor the duties incident to it can be properly exercised or discharged; whilst it can not well be suspended, owing to the impossibility of taking up the joint business after the war at the precise point at which it was abandoned. Nevertheless, in *Matthews* v. *McStea* (91 U. S. 7) the Supreme Court of the United States, whilst fully recognizing the

general effect of war on commercial intercourse, held that inasmuch as such intercourse was permissible with the consent of the sovereign authority, and inasmuch as in that particular war a precise date for the cessation of intercourse had been fixed by the sovereign authority, the partnership then in question could not be deemed to have been dissolved prior to that date, and was therefore subsisting at the time of the transaction which formed the subject-matter of the suit. Even when a partnership is dissolved by war, it would seem that, on the return of peace, an alien partner may recover the value of his share in the partnership as at the date at which it was dissolved (*a*).

The same principle is equally applicable to other contracts and relations that would involve a continuance of commercial intercourse or correspondence between persons domiciled in the countries of the respective belligerents. In *New York Life Insurance Co.* v. *Statham* (93 U. S. 24; Scott, 512), the premiums on a policy of life insurance had been duly paid until the outbreak of the civil war; but in consequence of that event and of the parties being divided by the line of war, the premium due in December, 1861, was not paid; whilst the assured died in 1862. In the Court below it was held that the contract was merely suspended by war. On appeal to the Supreme Court it was held that the doctrine of suspension did not apply to executory contracts in which time was material; that in contracts of insurance a strict adherence to the stipulated times of payment must be regarded as material, for the reason that the business of life insurance was founded on the law of averages, which could not be interfered with without deranging the security of the business; and that the policy therefore came to an end on the first default. At the same time it was held that inasmuch as failure to pay was due to the outbreak of war and not to any fault of the assured, the representatives of the latter were entitled to recover the equitable value of the policy (*b*); just as in a contract for the sale of property to be paid for by instalments, the contract would be abrogated by war, although after the war the vendor would be held accountable to the purchaser for any payments previously made (*c*). On the other hand, in *Semmes* v. *Hartford Insurance Co.* (13 Wall. 158), it was held that where a policy had been entered into and a loss incurred prior to the war, an action thereon might be maintained after the war, notwithstanding a condition that such action must be brought within a stipulated time, so long as a compliance with this condition was prevented by the war (*d*). And similar rules would probably be followed by the English Courts (*e*).

(*a*) This, on the same principle as that applied to contracts of insurance: see *ante*, p. 69, and Latifi, 53.

(*b*) This being the amount of premiums previously paid, subject to a deduction for the value of the insurance enjoyed whilst the policy was in existence.

(*c*) Scott, 514.

(*d*) Scott, 516, n.

(*e*) See Phillipson, Effect of War on Contracts, p. 96 *et seq.*

c. As Involving Dealings with the Enemy.

ESPOSITO *v.* BOWDEN.

1857: 27 L. J. Q. B. 17: 7 E. & B. 763.]

Case. In 1853, prior to the outbreak of war between Great Britain and Russia, a charter-party had been entered into between the plaintiff who was a Neapolitan shipowner, and the defendant, who was a British merchant, whereby it was agreed that the plaintiff's vessel should proceed to Odessa and there load a cargo of wheat, to be provided by the defendant, on certain terms as to freight and demurrage. On the outbreak of war between Great Britain and Russia, the defendant refused to perform his agreement. In an action subsequently brought by the plaintiff for breach of agreement, the defendant pleaded that he was a British subject: that after the making of the charter-party, but before the ship had arrived at Odessa and before the defendant had provided a cargo, war was declared by Great Britain against Russia: that Odessa was a hostile port: and that it became impossible for the defendant to fulfil the charter-party without dealing with the Queen's enemies, of which the plaintiff had due notice. The plaintiff, in his reply, relied on the fact that the ship was neutral: that Odessa was not under blockade: and that by certain Orders in Council the Crown had permitted neutral vessels to carry goods and merchandise to whomsoever belonging into the British dominions, and British subjects to trade with all places not under blockade. In the Court below judgment was given in favour of the plaintiff: but on appeal this judgment was reversed on the ground that the contract was rescinded by the declaration of war, and that the Orders in Council could not revive it when once dissolved.

Judgment. In the judgment of the Exchequer Chamber, which was delivered by Wilde, J., it was pointed out that inasmuch as the presumed object of war was to cripple the enemy's commerce, the declaration of war imported a prohibition of commercial intercourse and communication with the inhabitants of the enemy

country, and that such intercourse, except by licence of the Crown, was illegal. In spite of some previous doubts on the subject, the case of *Potts* v. *Bell* (8 T. R. 548) and the great case of *The Hoop* (1 C. Rob. 196) had finally established this rule. These cases had further established that it was illegal for a subject, in time of war and without licence, to bring from the enemy's port even in a neutral ship goods purchased in the enemy's country after the commencement of hostilities, even though not appearing to have been purchased from an enemy. In fact, any trading with the inhabitants of an enemy country was trading with the enemy. The force of a declaration of war was equivalent to an Act of Parliament as regards prohibition of intercourse with the enemy, except by the licence of the Crown. This was founded on the *jus belli*, which Lord Coke (Co. Litt. 11, b) had stated to be a part of the law of England.

With respect to the contention that the defendant might have procured a cargo from other persons than the Queen's enemies, apart from the fact that all persons inhabiting an enemy's country were *primâ facie* enemies, and that even British subjects if they remained and traded in the country after the outbreak of war would become enemies *ipso facto*, it would be altogether inequitable to compel the charterer to seek out at his peril in an enemy's country persons who had acquired the goods before the war under circumstances which entitled them to remove such goods from the enemy's country without a licence. Moreover, it had been expressly held in *Potts* v. *Bell* *sup.* that goods purchased in the enemy's country since the war, even though not from enemies, could not without licence be lawfully shipped even in a neutral vessel. Nor could the cargo in such a case have been put on board without some dealing with the enemy. With respect to the contention that the charterer should have provided a cargo before the war, apart from the fact that he was under no obligation to do this, the same difficulty would arise as regards dealing with the enemy, even in the passing of the cargo through the Customs and obtaining a Russian permit.

In a case where the carrying out of the contract involved a

[illegible] (1 Q. B. D. 182).

dealing with the enemy, the charterer could maintain no action against the shipowner; and the shipowner ought not, therefore, to be entitled to sue the charterer. Just as the plaintiff would have been absolved from going to Odessa if war had broken out between Russia and his country, so the defendant was absolved from providing a cargo on war breaking out between Russia and Great Britain. Nor could the contract in such a case be deemed to be merely suspended by a war the end of which could not be foreseen. The more convenient course was to regard both parties as absolved and as being at liberty to make new arrangements.

The contract in this case, it will be observed, was not between enemies, but between a British subject and a neutral; but, inasmuch as it could not be fulfilled without violating the rule of non-intercourse, and could not conveniently to either party be suspended, it was held to be abrogated. The judgment also serves to illustrate the nature and scope of the rule of non-intercourse, founding this rule on the *jus belli*, which itself constitutes part of the common law, and treating it as a rule of international, rather than of municipal, law *b*. It was also held that the application of the rule in this particular case was not affected by the Orders in Council *c*.

SUBSEQUENT TRANSACTIONS: TRADING WITH THE ENEMY.

THE "HOOP."

1799. [1 C. Rob. 196; Tudor, L. C. in Mercantile Law, 921.]

Case. During war between Great Britain and Holland, the Hoop, a neutral vessel, shipped at Rotterdam a cargo of merchandise on account of certain British subjects, and thereafter proceeded on a voyage nominally to Bergen, but really to a British port. In the course of the voyage she was captured by a British cruiser, and it was sought to condemn the cargo as being the property of British subjects engaged in trade with the enemy. This was resisted on the ground that the claimants, who had previously

b See [illegible] 1 T. C. [illegible], p. 72; [illegible], p. 91, 179.

been engaged in an extensive trade with Holland, had, after the irruption of the French into Holland, but before the present war with Holland itself, obtained special Orders in Council permitting them to continue their trade; whilst, after the present war, they had been informed by the Commissioners of Customs at Glasgow that no further Orders were necessary. In view of this, they had caused the goods to be shipped at Rotterdam on their account; documenting them ostensibly for Bergen in order to avoid the enemy's cruisers. Under these circumstances it was urged that their claim was entitled to great indulgence. Despite these facts, however, a decree of condemnation was pronounced.

Judgment. Sir W. Scott, in giving judgment, stated that by a general rule in the maritime jurisprudence in this country all trading with the public enemy, save by permission of the Sovereign, was forbidden. And this was not a principle peculiar to the law of this country, but was pronounced by Bynkershoek, notwithstanding some occasional and particular relaxations, to be a universal principle of law; and it did in fact appear to be a principle followed in most of the countries of Europe. In this country the Sovereign alone had the power of relaxing it by permitting such commercial intercourse. There might be occasions on which such an intercourse would be highly expedient; but it was for the State alone, and not for individuals, to determine this. No principle ought to be held more sacred than that such intercourse could not subsist on any other footing than the direct permission of the State. Otherwise great public inconvenience might ensue; whilst there was but little inconvenience in requiring merchants, in such a situation, to carry on trade (if necessary) under the control of the Government. There was, moreover, another principle of a less public nature, but equally general in its reception, which forbad this sort of communication as fundamentally inconsistent with the relation between two countries at war. That was the total inability, on the part of subjects of one country to sustain any contract by way of appeal to the tribunals of the other. In the law of almost every country the character of alien enemy carried with it a disability to sue, or to sustain a *persona standi in judicio*. The peculiar law

of our own country applied this principle with great rigour: and it was equally received in our own Courts of the law of nations. But a state of things in which contracts could not be enforced could not be a state of legal commerce. Upon these and similar grounds, it had become an established rule of the Court that trading with the enemy, except under the royal licence, subjected the property involved to confiscation. After an exhaustive review of the authorities the learned judge proceeded to show, that this rule had also been uniformly followed in the Court of Admiralty and sustained in the Courts of Appeal: that it had been rigidly enforced in the construction of relaxations even when granted by or under the authority of statute: and that it had been enforced not merely against British subjects but also against the subjects of States that were our allies in war, on the supposition that it was founded on a universal principle which States allied in war had a right to apply mutually to each other's subjects. In order to take a case out of the rule there must be legal distinctions and not merely considerations of indulgence: and inasmuch as there did not appear to be any such distinctions in the present case the claim for restitution must be refused.

The rule of non-intercourse is here again presented as a common principle of maritime law, justified alike on grounds of reason and by common practice, and enforceable internationally *ex vi*. Both under the English and the American law, all trading between persons respectively resident in the national and in enemy territory is forbidden under pain of confiscation, which will affect not only the goods but also the vessel that carries them if it belongs to subjects or citizens.

And this is applied not merely to trading properly so called, but to all trade between the home and the enemy country *b*. So rigidly is this rule interpreted that during the Spanish-American war, 1898, a question arose as to the legality of the despatch to Spain of papers and journals by American societies to Spanish correspondents, although in the result it was officially intimated that there was no objection to a continuance of the practice, provided no information was furnished which was likely to be of use to the enemy.

And not only merchandise, all goods passing directly between subjects and enemies will be confiscable; and this, whether they are

[illegible] 8 Cranch, 253; [illegible] 155; and [illegible] Moore, Digest, vii. 243.

coming from or proceeding to the enemy (*d*); and, in the latter case, whether the hostile destination is immediate or ultimate (*e*). But the rule will not apply when the trading is carried on in the interest of the national forces (*f*). Nor will it apply where there has been a genuine transfer to a neutral owner, even though the property ultimately comes from or is proceeding to, an enemy (*g*). Nor, finally, will it apply to a mere wish or intention to trade, in a case where the illegality of the destination is changed by circumstances of the war (*h*).

As regards ships, under the same rule, any vessel belonging to subjects will be liable, if after notice of the war she sails from, or to, or even touches at, an enemy port (*i*). But a vessel carrying cargo to a neutral port will not be liable merely because the cargo or some part of it is intended by the shippers, and without the cognizance of those responsible for the vessel, to be sent on to the enemy country (*j*).

Apart from trading ventures, moreover, all contracts or other transactions entered into after the war between persons respectively resident in British and enemy territory are treated as illegal and void. So, in *Willison* v. *Patteson and others* (7 Taunt. 439) where, during war between Great Britain and France, a French citizen had drawn on the defendants, who were British subjects, certain bills of exchange, which were endorsed to the plaintiff, a British subject resident in France, and subsequently accepted by the defendants—it was held that no action would lie on the bills, even though brought after the restoration of peace.

A similar invalidity will attach to contracts and transactions which, even though not themselves entered into with alien enemies, are yet incidental to or in furtherance of such illegal trading or intercourse. So, in *Potts* v. *Bell* (8 T. R. 548), it was held that a policy of insurance entered into between British subjects, in relation to goods to be brought from the enemy country on behalf of the assured, was illegal and void as being in furtherance of trade with the enemy; and this even though the loss alleged under the policy arose from enemy capture.

The rule against trading with the enemy is also applied to subjects of an ally in war, on the ground that there is an implied obligation incumbent on each party not to do or allow its subjects

(*d*) *The Hoop*, 1 C. Rob. 196, 253.

(*e*) Even though they may be shipped in the first instance to a neutral port: see *The Jonge Tobias*, 1 C. Rob. 329; *The Maria*, 1 C. Rob. 340; *The Hoop*, 1 C. Rob. 196; *The Stert*, 4 Cape Times L. R. 150; the goods in the case cited having been already liable as enemy property.

(*f*) *The Hoop*, 1 C. Rob. 196; *The Stert*, 4 C. Rob. 295.

(*g*) *Ex parte Chinery*, 1 De G. 90.

(*h*) *The Hoop*, 1 C. Rob. 196; *The Rose*, 2 C. Rob. 251.

(*i*) *The Jonge Tobias*, 1 C. Rob. 329; *The Hoop*, 1 C. Rob. 196; *The Rose*, 2 C. Rob. 251; *The Franklin*, 3 C. Rob. 217; *The Ocean*, 5 C. Rob. 90; *The Neptunus*, 6 C. Rob. 403; *The Hurtige Hane*, 6 C. Rob. 390; *The Vrouw Judith*, 1 C. Rob. 150; *The Hoffnung*, 6 C. Rob. 112; *The Charlotte*, 8 Cranch, 53; *The Ocean*, 8 Cranch, 253; *The Rose*, 8 Cranch, 451; Manual of Naval Prize Law, Arts. 44–47.

(*j*) In *The Maria* (4 Cape Times L. R. 150), the vessel was released on the ground that the presumption of an intention to trade with the enemy, arising from the fact of the ship carrying enemy goods consigned to Delagoa Bay (en destined for an enemy country), had been rebutted by the conduct of those responsible for the vessel.

to do anything injurious to the common cause (*k*); nor would a dispensation by the allied Government, even in favour of its own subjects, be recognized as a protection against British capture, unless consented to by Great Britain or unless the trading was of a kind that would not prejudice the common operations (*l*).

At the same time the British rule against trading with the enemy is, as we shall see, alleviated in practice (1) by the fact that the Sovereign has a right to mitigate the strict consequences of war in this respect by Orders in Council, which would be operative as an instruction to the naval forces and so binding on the Prize Courts (*m*); and (2) by the recognition of a right to trade through the medium of neutrals so long as there is a genuine transfer to the latter (*n*).

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iii) EXCEPTED TRANSACTIONS.

1) Between Enemies not Divided by the Line of War.

KERSHAW *v.* KELSEY.

[1868: 100 Mass. 561.]

Case. In 1864, during the American civil war, the plaintiff, who was a citizen of and resident in Mississippi, leased to the defendant, who was a citizen of Massachusetts although at the time resident in Mississippi, a cotton plantation situated in the latter State, on certain terms and conditions, including the purchase by the defendant of certain corn then on the plantation. The defendant went into possession of the land, had the benefit of the corn, and paid the first instalment of rent. He also planted and cultivated land, but was subsequently driven out by rebel soldiers, and did not thereafter except for a short interval return to the plantation, but proceeded to Massachusetts. The plaintiff thereupon took charge of the plantation, and raised a crop of cotton thereon, which he subsequently delivered to the defendant's son at Mississippi, by whom it was forwarded to the defendant. After the war the plaintiff sued for the rent and the value of the

(*k*) *The Neptunus* (1799), 1 C. Rob. 251; *The Hoffnung* (1799), 2 C. Rob. 162; *The Minerva* (1799), 2 C. Rob. 228; *The Ringende Jacob* (1799), 2 C. Rob. 99; *The Vrouw Judith* (1799), 2 C. Rob. 150; *The Vrouw Judith* (1799), 4 C. Rob. 406; *The Hoffnung* (1799), 4 C. Rob. 162; *The Minerva* (1799), 4 C. Rob. 228; *The Ringende Jacob* (1799), 4 C. Rob. 99

corn. The defendant pleaded that the transaction, having been made during the civil war and between persons standing in a hostile relation to each other, was illegal and void, both on the principles of international law and under an Act and proclamation that forbad all intercourse with the States in rebellion. It was held, however, by the Supreme Court of Massachusetts that neither the lease nor the sale contravened either the law of nations or the public Acts of the United States Government; and that the plaintiff was therefore entitled to recover.

Judgment. In delivering judgment, Gray, J., stated as the result of an exhaustive review of the principal authorities, both English and American, that the law of nations, as judicially declared, no doubt prohibited all intercourse between citizens of the two belligerents which was inconsistent with the state of war between the two countries; including every kind of trading or commercial dealing, whether by transmission of money or goods or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form involving such transmission, or by insurances upon trade with or by the enemy. But the prohibition had not been carried beyond this, at any rate by judicial decision; and beyond this, therefore, the Court was not disposed to go, especially at a time when the tendency of the law of nations was to exempt individuals as far as possible from the consequences of war. The trading or transmission which was prohibited by international law was one between the two countries at war. An alien enemy residing in the United States might contract or sue like a citizen. Moreover, when a creditor, although a subject of the enemy, remained in the country of the debtor or had an agent there throughout the war, payment to such creditor or agent would not be illegal, inasmuch as it was not made to an enemy within the contemplation of either international or municipal law. Nor was it any objection that the agent might remit the money to the enemy, for in that case the offence would be his. The same reasons applied to an agreement made in the enemy territory to pay money there out of funds accruing there. In the present case the lease was made within

the rebel territory where both parties were at the time. Nor was there any agreement for the transmission of money or goods, or for communication across the line dividing the belligerents. The subsequent forwarding of the cotton by the defendant's son might have been unlawful; but that could not affect the validity of the agreements contained in the lease.

In this case the American Court, whilst affirming generally the rule of non-intercourse, held it to be inapplicable as regards persons who though enemies in point of nationality or allegiance were resident in the territory of the same belligerent, and as regards transactions beginning and ending there. "An alien enemy," it was said, "residing in this country may contract and sue like a citizen [*a*]." And with this view the English law appears, in the main, to agree. So in *Wells* v. *Williams* (1 Ld. Raym. 282) in an action on a bond in which the defendant pleaded that the plaintiff was an alien enemy who had come to England *sine salvo conductu* and the plaintiff replied that at the time of the making of the bond he was and still remained in England by the licence and protection of the Crown: it was held that an alien enemy who was here in protection could sue on his bond or contract, although an enemy abiding in his own country could not. And, in spite of some authority to the contrary (*b*), it would seem that the plea of alien enemy could not now be set up against subjects of a hostile State who, even without express license, continued to reside and to carry on business in British territory (*c*).

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2. Licensed Trade.

USPARICHA *v.* NOBLE.

(1811: 13 East, 332.)

Case. During war between Great Britain on the one hand and France and Spain on the other, the plaintiff, a Spaniard domiciled in Cadiz, having obtained a license from the Crown to ship goods [illegible] in ports of Spain. The vessel was

[illegible] enemy residing without license [illegible] during the war.

[illegible] 1902, A. C. at 505 [illegible] p. 30.

captured by the French and condemned. The present action was on a policy of insurance, the validity of which turned on the legality of the trade. In the result it was held that the effect of the license was to legalize the trade, and that the policy was therefore good, and that judgment must pass for the plaintiff.

Judgment. Lord Ellenborough, in giving judgment, laid down that the legal result of the license was that the commerce must be regarded as legalized for all purposes necessary to its due and effectual prosecution, for the benefit either of the party himself or of his correspondents abroad, even though residing in the enemy's country. The Crown could in its discretion exempt any person and any branch of commerce from the disabilities and liabilities arising out of a state of war; and its license for such a purpose ought to receive the most liberal construction. For the purposes of the license, the person licensed ought to be regarded as an adopted British subject, and the trade as a British trade.

A license in its widest sense is a permit granted by a belligerent State either to its own subjects, or to enemy subjects, or to neutrals, authorizing the doing of something otherwise interdicted by war. The type of license most familiar to the Courts is a license to trade; although such licenses are now less frequent than formerly. A license to trade may be either general or special. A general license is one issued to all subjects or even to all persons, authorizing a trade with a particular place or in particular articles; whilst a special license is one issued to individuals for a particular voyage, or for the importation or exportation of particular goods (*b*). The object of licenses is to relieve the commerce of the State, either generally or in regard to particular commodities, from the restraints otherwise imposed by the war (*c*). A general license can only be issued by the supreme authority; but a special license may be issued either by the supreme authority, or by a naval or military officer acting within the limits of his particular command (*d*). A license, if duly issued, and if its terms are complied with, serves to legalize all transactions necessary to the due prosecution of the trade which is licensed, and also to relieve the person or persons in whose favour it is granted from the disabilities that would otherwise attach under the laws of the issuing State (*e*).

(*b*) These terms are, however, used in different senses by different writers: see Hall, 550; Moore, Digest, vii § 1141; Halleck, ii. 344.

(*c*) *Potts* v. *Scott* (5 Taunt. 674).

(*d*) On the question of authority, see *The Hope* (1 Dod. 226); *The Sea Flower* (5 Wall. 630).

(*e*) *Supra*, but see also *Potts* v. *Inglis* (8 East, 273).

A license issued by one belligerent does not, of course, bind the other; and may even confer on the holder in relation to the latter an enemy character that would not otherwise attach to him. The grant of licenses by one of two co-belligerents is subject to the consent of the other, or at any rate, to the condition that the trade licensed shall not interfere with the common operations (*f*). Licenses to trade were extensively issued by Great Britain during the Napoleonic wars, and a considerable body of case law grew up in respect of them (*g*); but such licenses are no longer usual except as incident to particular military or naval operations, and the law in relation to them is no longer so important as it once was (*h*).

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3. Prisoners' Contracts.

ANTOINE *v.* MORSHEAD.

[1815; 6 Taunt. 237.]

Case. This was an action on certain bills of exchange which had been drawn on the defendant by his father, who was a British subject detained as a prisoner in France during the war between that country and Great Britain. The bills were made payable to other British subjects, likewise detained as prisoners in France; but had been indorsed by them to the plaintiff, who was a banker at Verdun and a French subject: and had finally been accepted by the defendant. A verdict having been found for the plaintiff, a rule *nisi* was moved for on behalf of the defendant, on the ground that the contract had been made during war with an alien enemy, and was therefore not merely suspended by the war but altogether void. In the result, however, it was held that the action was maintainable.

Judgment. Gibbs, C.J., in giving judgment, pointed out that the present case was not one of a bill of exchange drawn in favour of an enemy, nor of a bill of exchange drawn by one subject in favour of another, both subjects resident in Great Britain, the

(*f*) [illegible] ii. 341 *et seq.*

(*g*) [illegible] examples of a license to [illegible] to the enemy Government, see Moore, Digest, vii. 255.

two former being detained as prisoners in France. In the circumstances he thought that the drawer might legally draw such a bill as being necessary for his subsistence. After the bill had been drawn the payee had no doubt indorsed it to the plaintiff, who was an alien enemy. But how was the original drawee to avail himself of the bill except by negotiating it, and to whom could he negotiate it except to the inhabitants of the country in which he was? The general principles deducible from the cases cited for the defendants with respect to contracts with alien enemies were not altogether applicable to the present case. Hence he was of opinion that the indorsement to the plaintiff conveyed to him a legal title, on which the King might have sued in time of war, and on which—this not having been done—the plaintiff could sue now that peace had been proclaimed (*a*).

Although the original contract in this case was made between British subjects, yet the indorsement to the plaintiff and the subsequent acceptance by the defendant involved a dealing during war between enemies. The decision must, therefore, be taken to rest on the special necessities of prisoners of war; and to be intended to provide a means whereby alien enemies may supply prisoners' wants, with an assurance of being able to sue on their contracts after the return of peace. It has, in fact, been treated, in American cases in which it has been cited, as having this character; and as establishing an exception to the general rule of non-intercourse (*b*). Prisoners of war detained in England are also at liberty to sue in the English courts on contracts of service entered into by them during the war (*c*).

4 Ryan & M. Contracts.

RICORD *v.* BETTENHAM.

[1765; 3 Burr. 1734.]

Case. In 1762, during war between Great Britain and France, the English ship "Savage," of which the defendant was master,

(*a*) See also [illegible] v. [illegible], 1 W. Bl. (Civ. Cases), 181; Scott, at 6 T. R. 532 577.

(*b*) [illegible] v. [illegible], 2 Bos. & P. 236).

was captured by a French privateer, but released on the defendant giving a ransom bill for 300 pistoles to the plaintiff, the commander of the privateer, and leaving Joseph Bell, the mate of the ship, as hostage. Bell subsequently died in prison, and the present action was thereupon brought on the ransom bill. On behalf of the defendant it was contended that there was no precedent for such an action: that the contract was void as having been made with an alien enemy: and that, inasmuch as the ransom bill was not an independent contract, the hostage alone was entitled to sue thereon. These objections were, however, overruled, and judgment given for the plaintiff. The grounds of the judgment are not stated in the report: but, presumably, it proceeded on the ground that such contracts were usually held valid amongst other nations, and that the hostage was merely left as collateral security.

The decision in this case seems to accord with the practice followed in most other systems of municipal law that recognize ransom contracts (*a*). It was also followed by the English Courts in *Cornu* v. *Blackburne* (2 Doug. 641), where it was held that neither the death of the hostage, nor the capture of the original captor (although without an appropriation of the ransom bill (*b*)) put an end to the contract. In *Anthon* v. *Fisher* (2 Doug. 649, n.), indeed, it was held that an alien enemy could not sue in person even on a ransom contract; the proper course being to commence a suit in the first instance against the ship and goods, or failing this against the master in the name of the hostage (*c*). But this view is now generally reprobated, on the ground that if the contract is lawful it must be held to suspend the character of enemy *quoad hoc* (*d*).

Both the granting of ransom contracts by captors, and the entering into ransom contracts by vessels captured, are often forbidden by municipal law (*e*). Under the British system the practice of giving ransom contracts is now regulated by the Naval Prize Act, 1864. This empowers the Crown in Council, as it may deem expedient, either to prohibit or to allow, either wholly or in certain cases or subject to conditions, the entering into contracts for the ransom of ships or goods belonging to British subjects taken as prize by the enemy; and places all such contracts under the exclusive jurisdiction of the Court of Admiralty (*f*). Nor is a British captor at

(*a*) See [illegible] 187, [illegible].

(*b*) This is [illegible] being considered.

(*c*) A similar opinion was expressed by S. W. Scott in the case of *The Hoop*, 1 C. Rob. at 201. See also *Lartigue* v. *Reeves*, 3 B. & P. 191.

(*d*) See Wheaton Dana's, 506, n.; Kent, Com. i. s. 105.

(*e*) See Hall, 455, n.

(*f*) See s. 45, the provisions of which are reproduced in the Naval Prize Bill of 1911.

liberty to grant ransom to an enemy vessel, except in cases similarly allowed by Order in Council (*g*). In *Maisonnaire* v. *Keating* (2 Gall. 325) the practice of ransom was extended by the United States Courts to the case of a neutral vessel which had been captured by one belligerent on the ground of carrying contraband to the other but released on giving a ransom bill; Story, J., holding that inasmuch as the cargo would probably have been liable to condemnation the ordinary rules of ransom must be deemed to apply.

General Notes. *The Effect of War on Commercial Intercourse.* - There is still much divergence alike of opinion and practice as to the effect of war on commercial intercourse between subjects of the respective belligerents. According to one view which is commonly, although not universally, accepted by European publicists and followed by European Governments—the rule that war in itself involves a prohibition of commercial intercourse no longer obtains, having lapsed with the right of confiscation; although it is recognized that the sovereign authority may impose such restrictions thereon as may be required by political or military necessity (*h*). According to another view—which is commonly, although again not universally, accepted by English and American writers, and which is, as we have seen, also followed by the English and American Courts (*i*) the rule that war in itself involves a general prohibition of intercourse as between persons residing in the territories of the respective belligerents still obtains, both as a rule of municipal and international law (*j*); although it is here too recognized that the rule is subject to relaxation by the sovereign authority. This view rests on the grounds that such persons are still to be regarded as enemies for the general purposes of the war; that to allow a continuance of commercial intercourse would tend to strengthen the enemy's resources, and to supply him with information; and, finally, that the fact of an enemy person having in general no *persona standi in judicio* excludes altogether a state of legal commerce (*k*).

The Question of the Effect of the Hague Regulations. 1907. By Art. 23 (h) of the Hague Regulations it is forbidden to belligerents "to declare extinguished, suspended, or unenforceable in a court of law, the rights or rights of action of the nationals of the adverse

(*g*) See 29 & 30 Vict. c. 109, s. 41; Manual of Naval Prize Law, Art. 273.

(*h*) Even here, however, opinion varies; some writers holding that, although the right of action is not suspended, any benefit derived from the judgment is deferred until the conclusion of peace; see Phillipson, Effect of War on Contracts, 53 L. Q. R. 73 *et seq.*

(*i*) It has been suggested that the decision in the American case of *Ware* v. *Hylton*, 91 U. S. 7 practically brings the American view into line with the European view; see Lordwell, 202; but in spite of some expressions contained in the judgment, its general tenour does not appear to bear this out; see p. 70, *supra*.

(*j*) See, *inter alia*, pp. 74, 76.

(*k*) *The Hoop*, 1 C. Rob. 196 (although if the right of intercourse were conceded, the right of suit would doubtless follow).

party." By some this is interpreted to mean that each belligerent is in general prohibited from suspending or abrogating, by reason of the war, any rights or rights of action of subjects of the other. Such a construction would, if it could be sustained, go far to annul, as between States that have ratified the Convention, the present Anglo-American doctrine as to the effect of war on private rights and obligations; although it would still be open to a belligerent to prohibit subsequent dealings. But the clear intention of this provision is, it is conceived, merely to prohibit a belligerent commander, in the exercise of his military authority over territory subject to martial law, from suspending or abrogating rights or rights of action on the part of subjects of the other belligerent, or otherwise interfering with purely civil relations (*l*). That this is so appears to be sufficiently indicated by the fact that the article forms part of a Convention which purports to deal only with the conduct of land war, and to exclude maritime relations, to which such contracts are for the most part incident; that it does not even appear in the main body of the Convention but only in the annexed regulations; that amongst these it appears only at the end of an article dealing with prohibited methods of conducting hostilities; and finally, that it makes no exception of transactions that enure to the aid of the enemy, as it inevitably would if it were intended to be of general application. Nor can it be supposed that so revolutionary a change would have been accepted without protest or reservation on the part of States whose established doctrines were to that extent abrogated (*m*). On this assumption we may therefore proceed to consider the effect of the rule of non-intercourse, under the Anglo-American doctrine, on some of the more important mercantile relations and transactions subsisting between persons divided by the line of war.

Debts. Debts already subsisting between individuals divided by the line of war are suspended during the war, both as regards the right of action of the creditor (*n*) and the duty of payment on the part of the debtor. Any such payment would indeed be illegal if it involved a transmission of money to the enemy country (*o*). Nor will any interest, even though otherwise payable, be due to the creditor in respect of the period covered by the war; for the reason that interest is payable "for the forbearance of money," whereas in time of war payment cannot be exacted, and there is therefore no forbearance. But this will not apply where the debt is payable at a fixed date, as is usual in cases where the debt is secured by mortgage

(*l*) Pearce Higgins, 263 [illegible].

(*m*) Hollond, War on Land, 11. The British view appears to be that the effect of this provision is merely to forbid a commander in the field from attempting to terrorize the inhabitants of enemy territory by depriving them [illegible] of existing opportunities of obtaining relief in respect of private claims.

(*n*) *Ex parte Boussmaker*, 13 Ves. 71; *Kershaw* v. *Kelsey*, 100 Mass. 561; Scott, 535.

(*o*) *The Hoop*, 1 C. Rob. 196; *Hanger* v. *Abbott*, 1 Ld. Raym. 282; *Ex parte Boussmaker*, 13 Ves. 71; *Kershaw* v. *Kelsey*, 100 Mass. 561; Scott, 535.

or other form of security—for in such a case interest is due not for forbearance but by virtue of the original agreement; although, even in this case, if the agreed date for payment of the principal should be reached during the war no further interest will be due (*p*). Subject to these reservations, the right of the creditor to recover both principal and interest will revive on the return of peace (*q*). Nor, if the debtor is sued, will it be open to him to set up any plea of limitation, as regards the period covered by the war; for the reason that during that period the right of action is deemed to have been in abeyance (*r*). Debts contracted during the continuance of war are, of course, irrecoverable (*s*), save in the case of transactions specially excepted under the *jus belli* (*t*).

Negotiable Instruments. Negotiable instruments, and, in particular, bills of exchange and promissory notes, are governed by similar principles, subject only to such qualifications as flow from their negotiable character. If made before the war, and between persons domiciled in the countries of the respective belligerents, they are, in the hands of an alien enemy, incapable of being sued on during the war, but will revive on the restoration of peace; although no interest would appear to be recoverable in respect of the period covered by the war (*u*). But if transferred to a neutral, there would appear to be nothing to prevent the latter from suing and recovering thereon, even during the war, in his own name (*x*). If made during the war they are, as we have seen, illegal in their inception and incapable of legal effect, even if transferred to a neutral or British subject (*y*), save in cases specially excepted under the *jus belli* (*z*).

Contracts of Affreightment. A contract of affreightment made prior to the war, between persons who subsequently come to occupy a hostile relation to each other, will, if executory, be abrogated by war (*a*); whilst even if executed in part or whole it will be suspended, as to its further legal effects, during the war (*b*). Even

(*p*) See *Jacobs* v. *Hornby*, 2 Doug. 247; *Hanson* v. *Meyer*, 6 East, 614; *Boyle* v. *Zacharie*, 6 Pet. 635; *Ex parte Boussmaker*, 13 Ves. 71; *Ex parte Boussmaker*, 1 Dowl. & Ry. 16; *Hoare* v. *Allen*, 2 Dall. 102; but see also an article on "Interest on Debts during War," by C. W. Gregory, L. Q. R. xxv. 297, July, 1909.

(*q*) *Hanson* v. *Meyer*, 3 Camp. 150, 152; *Antoine* v. *Morshead*, 15 East, 260.

(*r*) *Hanson* v. *Meyer*, 6 East, 614; 3 Camp. 532; Scott, 506. This would now probably be followed in English law; see *Ex parte Boussmaker*, 1 Dowl. & Ry. 16, where a debt incurred in 1787 was held to be recoverable in 1822, although, without question, lost sight of; and a dictum in *Jacobs* v. *Hornby*, 2 Doug. 247; 4 H. & N. 178, and Vesey, Contracts, 344, and of the subject generally, Moore, Digest, vii. 252; American and English Encyclopædia of Law, xvi. 1069.

(*s*) *Hanson* v. *Meyer*, 7 Taunt. 439.

(*t*) See, pp. 66, 78, *et seq.*

(*u*) *Ex parte Boussmaker*, 1 Dowl. & Ry. 16; *Hoare* v. *Allen*, 2 Dall. 102; Scott, 498.

(*x*) *Antoine* v. *Morshead*, 6 Taunt. 332.

(*y*) *Hanson* v. *Meyer*, 7 Taunt. 439.

(*z*) See, pp. 66, 78, *et seq.*

(*a*) *Esposito* v. *Bowden*, 7 E. & B. 763.

(*b*) Except probably as to effects which involve no violation of the rule of non-intercourse; such as the en-

if not made between persons who subsequently become enemies, it will be abrogated by war, if it involves either the shipowner in an obligation to carry his vessel to an enemy port (*c*); or the charterer in illegal intercourse with the enemies of his country (*d*). Such contracts, if made during the war, between persons occupying a hostile relation to each other, are illegal and void.

Contracts of Insurance. In general, contracts of insurance, of whatever kind, if made before war, and the loss on which accrued before war, will merely be suspended in their legal effects by the outbreak of war between the States of the insurer and the assured, and can be sued on after the return of peace (*e*). But an insurance, even though made prior to the war, will not be deemed to avail against losses incurred by the British capture of enemy property (*f*). A contract of insurance entered into during the war with an alien enemy, or in relation to enemy property, will also be invalid (*g*), except when it relates to a trade carried on by license of the Crown (*h*), or to property which, although situated in the enemy country, belongs to a British subject or corporation (*i*). A contract of insurance, even when made between British subjects, will be invalid if made in furtherance of trade with the enemy (*k*). Contracts of life and fire insurance, in so far as they involve periodical payments, which cannot strictly be made between persons divided by war, would probably be treated as annulled by war; although subject probably to a right on the part of the assured to recover the equitable value of the policy as from the time of abrogation (*l*). This difficulty might, however, be got over by a stipulation providing for the appointment in the country of the assured of an agent for the purpose merely of receiving (but not of transmitting) the premiums during the war (*m*).

Contracts of Agency. A contract of agency already subsisting between persons who afterwards become enemies, and conferring a

enforcement of ... Sep. 1901, cargo delivered to ... ports, or even delivered to ... enemy port under ... *Bell* ... 7 E. & B. 760).

... L. R. 4 P. C. ... knowledge of ... conferred by ... 1, No. 6 of 1907, ... and ... notification. ... 7 L. R. 6 Q. B. 765).

... *Esposito* ... 1902, 2 K. B. 624.

(*c*) *Furtado* v. *Rodney*, 3 B. & P. 191.

(*d*) *Esposito* v. ... 6 T. R. 23.

(*e*) *Potts* v. ... 13 East, 332.

(*f*) This, although decided by *Mail Co.* v. *Hodgson*, 1901, 2 K. B. 849, is questionable in principle, and might be reversed by Court of Appeal.

(*g*) *Potts* v. *Bell*, 8 T. R. 548.

(*h*) *Wells* v. *Liverpool Co.*, 93 U. S. 24; *Scott*, 512; ... *Hamilton Co.*, 13 W. R. 158.

(*i*) Which would ... stipulation to ... 2 Ch.

(*k*) *Wells* v. *Liverpool Co.*, 95 U. S. 425.

general authority on the agent to buy and sell and enter into other transactions on behalf of the principal will, like a partnership, be abrogated by war (*o*). But a limited agency, if created before the war, and if it does not involve any continuance of intercourse or the transmission of money or property during the war, might, it seems, be lawfully continued (*p*).

Contracts of Partnership.—A contract of partnership already subsisting between persons who afterwards become enemies, is, as we have seen, abrogated by war; on the ground that the disabilities and restrictions created by war are inconsistent with a due exercise of the rights or a proper discharge of the duties incident to partnership, and that the relation is one which from its very nature is incapable of suspension (*q*); although such abrogation would probably be subject to a right of the alien partner on the termination of the war to recover the equitable value of his share at the time of dissolution (*r*).

Interests in Commercial Corporations and Companies.—A corporation is itself a juristic person, and as such takes its character in war, as friendly or hostile, in general from its domicile (*s*), irrespective of the nationality of its directors or shareholders (*t*). Nevertheless war may produce important effects on the legal position of enemy persons having interests in such associations. In English and American law, indeed, this question does not appear to be covered by any direct authority (*u*). But on principle and analogy it would seem (1) that enemy directors would *ipso facto* vacate their seats, although retaining otherwise such rights as belong to enemy shareholders; (2) that enemy shareholders would retain their shares as property, although both their right to receive dividends and probably their obligation to pay calls would be suspended during the war (*v*), both reviving, however, on the return of peace; and (3) that enemy debenture holders would retain their security, whatever its form, although the right to receive interest thereon

(*o*) *U. S.* v. *Grossmayer* (9 Wall. 72; Scott, 541, n.).

(*p*) *Small* v. *Livingston* (28 Grattan, 832; Scott, 538).

(*q*) *Griswold* v. *Waddington* (16 Johns. 438), cited in *Esposito* v. *Bowden* (27 L. J. Q. B. at 22).

(*r*) *Ante*, p. 71. As to the effect of war on copyright, see Opinions of U. S. Att. Gen., vol. xxii. 268, on guardianship, *Lehigh* v. *Wolcott* (114 U. S. 218); on succession, testate and intestate, *Inglis's Executors* v. *Hoxton's Lessee* (7 Cranch, 627); on the sale and conveyance of land, *Conrad* v. *Waples* (96 U. S. 279); on mortgages, *Clason* v. *Bailey* (121 U. S. 424), and on sales of personalty, *Ware* v. *Jones* (61 Ala. 288); *Montgomery* v. *U. S.* (15 Wall. 395); *Inglis* v. *U. S.* (143 U. S. 346).

(*s*) *Supra*, p. 26.

(*t*) *Janson* v. *Driefontein Consolidated Mines* 1902, A. C. at 501.

(*u*) But see *Executors Bousquet* (3 Ves. Jun. 71); and *Griswold* v. *Waddington* (*supra*), although the differences between partnerships and corporations render the reasoning in the last case largely inapplicable. For a fuller examination of "the problem of foreign investments in time of war," see R. V. Chadwick, L. Q. R. xx. 167.

(*v*) Although the latter conclusion is doubtful and might be held to depend on the character of the business.

or such part of the principal as might accrue due during the war, would be suspended *y*, both reviving, however, on the restoration of peace *z*.

Effect of War on Suits by Alien Enemies. It follows almost necessarily from the rule of non-intercourse that an action cannot in general be maintained or continued by or on behalf of an alien enemy *a*. Nor, even in suits depending between other persons, will the Court's sanction any communication with the enemy country, *b*. But such a disability will not attach to persons of enemy nationality who continue resident in British territory with the license of the Crown *c*. As to whether it would apply to enemy persons who continued so to reside without license, there appears to be some conflict of authority *d*. But if on the outbreak of war enemy subjects who may be resident in Great Britain are expressly authorized to continue their residence so long as they peaceably demean themselves, or even if such residence is impliedly authorized by their not being ordered to leave, it would seem that the usual consequences of licensed residence will attach *e*. It would seem also that an alien enemy continuing to reside in the country, whether with or without license, may be sued *f*. In any case, moreover, such rights of action will revive on the return of peace *g*.

Trading through the medium of the Neutral Flag. The rule of non-intercourse appears from the reasoning on which it is founded to contemplate strictly a complete cessation of all trade relations, whether direct or indirect, between subjects of the respective belligerents. But in modern times its stringency has been greatly relaxed in practice, both by the exemption of enemy goods of an innocent kind found in neutral ships *h*; and by the official recognition, in recent wars, of the legality of such a trade when carried on through the medium of the neutral flag, the former, although altogether different in its tenour, having probably facilitated the latter. So, in 1854, by an Order in Council of

x [illegible] interest were [illegible] payable to [illegible] any instrument [illegible] by custom, the amount [illegible] assignment to [illegible] W. [illegible] Co. [illegible] Ltd. [illegible] Prize Law is, [illegible] 167. [illegible] 196; *Rodney*, [illegible] 6 T. R. 23; *Le Louis*, [illegible] 502; and [illegible] v. [illegible] 17 [illegible]

examination of witnesses [illegible] *Ex parte* [illegible] 16 C. B. 192; [illegible] *Rogan*, 282.

[illegible] *Co.* [illegible] 1902, A. C. 565; [illegible] 3 T. L. R. 217; 24 L. J. Q. B. 19; and *Boehm* v. *Bouwer*, 2 Camp. 363.

See in the U. S. Courts, *The Sarah*, 10 Johns. 99, where it was [illegible] Prize [illegible] applied from evidence; *Bishop*, 66 Ill. 288; *Smith*, 515; [illegible] 21 Wall. 250.

[illegible] 66 [illegible] 17 [illegible]

the 15th April, all vessels under the neutral flag were permitted to import goods, to whomsoever belonging, into any port or place in the British dominions; and to export goods, not being contraband, from any port or place in the British dominions to any port or place in the enemy territory not under blockade; whilst British subjects were also permitted to trade freely, although only in neutral vessels, with the like places (*j*). In 1860 a similar concession was made by Great Britain and France during the war with China. In 1898, again, during the Spanish-American war although under the instructions issued by the United States Government (*k*) the clearance of American vessels in any case, and of foreign vessels carrying coal or contraband, for Spanish ports was forbidden it appears to have been open to neutral vessels to carry American or other cargoes, not being contraband or coal, to Spanish ports. And this example will probably be followed in the wars of the future. But where goods pass between enemies, it is necessary, in order to avoid a violation of the rule of non-intercourse—except of course where this has been expressly relaxed—that there should have been a genuine transfer to the neutral (*l*).

EXCURSUS I. THE CONDUCT OF WAR BY LAND, WITH SPECIAL REFERENCE TO RECENT CONVENTIONS.

The Growth of a Law of Land Warfare.

The rules which govern the conduct of war on land, although now based for the most part on convention, had, like most other branches of the law, their origin in custom. Some part of this customary

(*j*) Phil., iii. 120; Halleck, ii. 344; 1 Spinks, App. 5.

(*k*) Issued on the 27th April, 1898.

(*l*) In March, 1854, Lord Clarendon in answer to a question proposed by merchants interested in the Russian trade, as to whether Russian produce brought over the frontier and shipped thence by British or neutral vessels would be subject to seizure and confiscation after stating that the question turned not on the place of origin or mode of conveyance, but on the true ownership of and interest in the property, went on to say that if such property were shipped at a neutral port . . . after notice of the [enemy's] neutral property it would not be liable to condemnation whatever its destination; but that if it still remained enemy property, notwithstanding that it was shipped from a neutral port . . . it would be condemned, whatever its destination; whilst if it were British property or shipped at British risk, it would be condemned should it prove to be really engaged in trade with the enemy: *The Times*, 25th March, 1854. But the effect of the Order in Council of the 15th April, 1854, was to allow trade with the enemy so long as it was carried on through the medium of the neutral flag.

element dates back to a time anterior to international law; but the main part of it appears to have developed later, as a consequence of the institution of standing armies and the growth of a body of military usage and tradition. For a long time the rules of land warfare were markedly inferior, both in point of certainty and authority, to those which governed the conduct of war by sea *(a)*. But during the 19th century the law of land warfare attained certain notable improvements, both of form and substance, which left it for the moment in a position of superiority. Its improvement in form was probably due to the progress of military organization and discipline, which induced the military Powers to define and codify their national practice by the issue of manuals of instruction for the use of their armies in the field *(b)*. Its improvement in substance was due in part to the requirements of discipline, and in part to a desire to mitigate so far as possible the rigours of war, especially as regards their incidence on individuals. There was, however, still so great a divergence alike in interest and practice between different States or groups of States, as to make it evident that uniformity of rule could only be secured by common international action. At first only special branches or topics were dealt with in this way. So, in 1864, the Geneva Conference produced a Convention, which defined and systematized the laws of land warfare in relation to the treatment of the wounded and sick, and which speedily acquired an almost universal authority *(c)*. This was soon after followed by the Declaration of St. Petersburg, 1868, which imposed some limitation on the instruments of war *(d)*. The success of these limited compacts pointed the way to some wider agreement with respect to the conduct of war in general, to a general codification in fact of the laws of war on land. This project was at first only a subject for private or juristic discussion, *e.g.*, but later, and especially under the influence of the events of the Franco-German war of 1870, it became also the subject of diplomatic endeavour, with the result that in 1874 an International Conference on the subject was held at Brussels. This Conference, which was attended by fourteen of the leading States, drew up a declaration, known as the Declaration of Brussels, embodying some [illegible] articles purporting to declare the laws and customs of war on land. This Declaration, although never indeed actually accepted by the Powers *(e)*, for the Conference finally broke up on a question on which it was found impossible to reach any agreement, nevertheless exerted a profound influence on subsequent [illegible] and also served as a basis and model for subsequent codes. It was not until 1899, however, that the first Hague Confer-

(a) [illegible] Holland, War [illegible]

(b) [illegible] by the Institute of International Law in this [illegible] Borchard [illegible] was signed, [illegible] proceedings.

(c) [illegible] question of [illegible] territory of [illegible] occupied territory.

ence succeeded in framing an acceptable code, in the Convention "relating to the Laws and Customs of War on Land," No. 2 of 1899; the actual rules being contained in Regulations annexed thereto. At the second Hague Conference a new Convention "relating to the Laws and Customs of War on Land," No. 4 of 1907, with similar Regulations annexed, was adopted; revising and replacing as between the signatories the Convention and Regulations of 1899. This Convention may probably be said, so far as relates to the topics with which it deals, and subject to the reservations made by particular signatories, to constitute an authoritative statement of the existing law. It is not, however, entirely comprehensive, and requires to be supplemented at many points by reference either to other international Acts or to the earlier customary law (*i*). The adoption by common agreement of uniform rules regulating the conduct of war has, in addition to other advantages, the merit of bringing home to men's minds the fact that war is itself a subject for legal regulation, and not, as was thought in the past, a condition of entire lawlessness (*k*).

The Sources of Existing Rules.

The existing law therefore comprises two main factors the conventional or written law, and the customary or unwritten law. (1) The conventional law includes the following international Acts: (1) The Convention "concerning the laws and customs of war on land," No. 4 of 1907, which in itself consists only of nine articles, but which has annexed to it a body of regulations, hereafter referred to as the Hague Regulations, which present the rules of war in a form suitable for communication to soldiers and others not versed in diplomacy. These Regulations deal with the qualification of belligerents, the treatment of prisoners of war, the methods of injuring the enemy, non-hostile relations, and military authority over hostile territory (*l*). (2) The Convention "respecting the rights and duties of neutral powers and persons in war on land," No. 5 of 1907, which, however, only touches on the action of belligerents at certain points (*m*). (3) The Geneva Convention of 1906, which deals with the treatment of the wounded and sick, as regards armies in the field, replacing as between its signatories the earlier Convention of 1864 (*n*). (4) The Declara-

(*i*) See H. C., No. 4 of 1907, Art. 2; and p. 94, *infra*.

(*k*) And this even though the fact of war may involve a suspension of the territorial law in matters relating to the conduct of hostilities: see p. 49, *supra*.

(*l*) This Convention was signed by forty-one States, although in some cases with reservations, and has now been ratified by Great Britain and the United States. As to other ratifications, see Table, App. xiv.

(*m*) See Arts. 1—4, 19. This Convention was signed by forty-two Powers. It has not so far been ratified by Great Britain. As to other ratifications, see Table, App. xiv.

(*n*) This Convention has been ratified by twenty-two States, including Great Britain (although under reservation of Arts. 23, 27, 28, relating to the civil use of the Geneva Cross; as to which, however, see now 1 & 2

tion of St. Petersburg, 1868, which forbids the use of explosive bullets under 400 grammes (*o*), but which is now virtually incorporated in the Hague Regulations (*p*). (5) The Hague Declaration, No. 2 of 1899, which prohibits the use of asphyxiating gases (*q*). (6) The Hague Declaration, No. 3 of 1899, which prohibits the use of expanding bullets (*r*). (7) The Declaration "prohibiting the discharge of projectiles from balloons," which was originally framed by the Hague Conference of 1899, and subsequently renewed by that of 1907 for a period extending to the meeting of the next Conference; although the abstentions are so numerous as to render this Declaration of little or no present value (*s*). All these agreements, with the exception of the last, purport to be binding on the Powers that accept them without limit of time; but they are all, with the exception of the Declaration of St. Petersburg, subject to denunciation, after notice; although the denunciation is only to affect the notifying Power, and will then only be operative after the lapse of one year from the date at which notice is given (*t*). They apply, moreover, only as between the contracting parties, and then only if all the belligerents are parties to the Convention (*u*). In the various Acts that go to make up this conventional part of the law, there are, as we shall see, many omissions as well as other defects of form and substance (*x*); but, as time proceeds, it is probable that many of these will be corrected or remedied by new legislation or the action of Courts.

(iii) Next there is the customary or unwritten law, the rules of which have to be sought in those sources, and subject to those tests, which have already been described (*y*). This law still applies both in cases which are not covered by the conventional law, and where that law or any particular provision is not applicable as between the parties to the war (*z*). With respect to the former class of cases (*a*), it is expressly declared by the Hague Convention, No. 4 of 1907, that "populations and belligerents remain under the protection and rule of the principles of the law of nations, as they result from usages

(*o*) 7 A. C. 20, and p. 105, n. (*a*), *ante*. The United States is a considerable number of States still remain [illegible] Convention of 1864. [illegible] has been accepted by nineteen States, including Great Britain, although the international status of [illegible] signatories has [illegible] a change. See II. R. 23.

(*p*) [illegible] by twenty-[illegible] Great Britain, [illegible] States.

[illegible] accepted by [illegible] Powers, but [illegible]

[illegible]

by twenty-seven Powers, including Great Britain, the United States, and Austria-Hungary, but not by Germany, France, Italy, Japan, and Russia. It has since been ratified by Great Britain. As to other ratifications, see Table, App. xiv.

(*r*) See by way of example, No. 4 of 1907, Art. 8.

(*s*) [illegible] Art. 2.

(*t*) See p. 95, *ante*, and as to [illegible] drafting, Holland, War on Land, 4.

(*u*) See vol. i. 6.

(*x*) For a list of reservations, see [illegible] App. xiv.

(*y*) [illegible] especially in relation to [illegible] Section, "II. R. [illegible] 2.

established between civilized nations, the laws of humanity, and the requirements of the public conscience" (*b*). Nor is it to be assumed that the mere absence of specific prohibition as regards any particular practice is to be taken as legalizing it (*c*). From this it will be seen that the earlier customary rules on this subject are far from having lost their applicability; although it is probable that in this, as in other departments, the conventional or written law will tend to become more and more predominant, and will ultimately become the only recognized standard of belligerent action.

The Effect and Value of the Hague Regulations.

With respect to the Hague Regulations, which now constitute the most important factor in the written law of war, the signatory Powers undertake to issue instructions to their land forces "in conformity therewith" (*d*); whilst the duty of compensation is expressly admitted in cases of violation (*e*). In this, as in other Conventions, some of the rules laid down are ambiguous or indefinite, whilst others are subject to qualifications that appear to rob them of most of their efficacy. But in the present condition of things, and as regards some of the rules in question, this was probably the price that had to be paid for apparent uniformity; whilst as regards others, some qualification was probably necessary if they were to stand the strain of actual war. Despite these imperfections, the rules, as a whole, represent a distinct advance on anything that has preceded them, and will probably serve at once to render more uniform the practice of war, and in some measure also to mitigate still further its hardships as regards individuals (*f*).

The Doctrine of "Military Necessity."

The binding force both of these and other rules is, however, seriously impugned by the doctrine of "military necessity" (*g*), which is put forward by German writers and officially countenanced

(*b*) See Preamble to H. C., No. 4 of 1907.

(*c*) Such a declaration was expressly made by Great Britain with respect to No. 8 of 1907, but appears to apply generally.

(*d*) See H. C., No. 4 of 1907, Art. 4; and also Geneva Convention, 1906, Art. 28.

(*e*) See H. C., No. 4 of 1907, Art. 3; and, on the question of responsibility, p. 113, *ante*.

(*f*) As the experience of the Russo-Japanese war of 1904-5, although under the earlier Conventions, has shown; see Bordwell, 1-3, 332.

(*g*) This is not to be confounded (1) with military necessity in the sense in which that is understood to sanction generally the destruction of life and limb and property, so far as the objects of war may require, and in so far as may be lawful according to the laws and usages of war; see Instructions for the Government of U. S. Armies in the Field: Arts. 14, 15; cited Moore, Digest, vii. 178; or (2) with those express reservations, as regards acts otherwise prohibited, which are frequently made both by the Hague Regulations and other Conventions, with the object of providing for cases of practical necessity.

by the German Government. In effect this doctrine appears to be that, although the recognized laws and customs of war must ordinarily be respected, yet, in exceptional cases, and where their observance would endanger the safety of the army or the attainment of the object of the war, the limitations which they impose on hostile license may be disregarded (*h*). This view purports to rest on the paramount principle of self-preservation, and on futility of requiring obedience to rules that are inconsistent therewith. But although self-preservation is a fact which has, no doubt, to be reckoned with in estimating the effect of all legal rules (*i*), and although in some systems it is for this reason formally recognized as a ground of non-liability, yet this is by no means universal (*k*). And even where it is so recognized, its scope is usually defined, and its exercise limited by safeguards which the municipal law prescribes and which the municipal Courts can give effect to. The doctrine of military necessity, on the other hand, reduces the existing restraints on hostile license—which are the product of centuries of effort—to the level of mere discretionary observances, dependent on the view of the local situation entertained by the officer in command; whilst it serves to relax the sanctions of the laws of war, already too slender, at a time when the temptation to disregard them is greatest (*l*). But the doctrine is not generally received outside Germany (*m*); and would, if acted on, form a just ground for reprisals by any belligerent who might be injuriously affected by it, as well as for protest or intervention on the part of other States if the circumstances warranted this (*n*).

The Qualifications of Belligerents.

In deference both to humanity and convenience a distinction has long been drawn between combatants and non-combatants, or between enemies who are actively belligerent and those who are not. The former may engage in hostilities, and are in turn exposed to violence or injury so long as hostilities continue; but on surrender or capture they are entitled to honourable treatment as prisoners of war, and incur no liability beyond detention (*o*). The latter are exempted so far as possible from direct injury or violence, but will forfeit this immunity and also become subject to special penalties if they engage in hostilities without having the requisite qualifications. The quality of lawful belligerents attaches to all members of the

(*h*) This finds expression in the maxim *Kriegsraison geht vor Kriegsrecht*.

(*i*) See vol. i. p. 164.

(*k*) It is not recognized, for instance, under the English law as a legal ground of non-liability, although often accepted in mitigation of punishment: see *Keyn* v. *Huddart and Stephens* (14 Q. B. D. 273).

(*l*) For a critical examination of the reasons on which the doctrine is founded, see Westlake, ii. 115 *et seq.*

(*m*) It is reprobated by English and American writers, and not generally accepted even by those of France and Italy: see Oppenheim, ii. 79.

(*n*) On the subject generally, see Westlake, ii. 115 *et seq.*; Holland, War on Land, 12 *et seq.*, and Oppenheim, ii. 84.

(*o*) Hall, 515 *et seq.*

regular army: to members of the militia and of volunteer corps forming part of the regular army; and also to other persons who are attached to the army even in a non-combatant capacity (*p*). But persons who merely follow an army without being attached to it, can, if captured, only claim to be treated as prisoners of war on production of an official authorization (*q*). The question of belligerent qualifications commonly arises in relation to the employment of irregular or guerilla forces; the levy *en masse* of the civil population; and the use of coloured troops. With respect to irregular forces, the Hague Regulations now provide that the quality of lawful belligerents shall attach to members of militia and volunteer corps, even though they may not form part of the regular army, provided that they are under the command of a responsible officer, that they possess some distinctive mark recognizable at a distance, that they carry arms openly, and that they observe the laws and customs of war (*r*). This involves the existence of an authority and an organization sufficient to guard against hostilities being carried on by irresponsible or intermittent combatants, but not necessarily an authority and an organization that proceed from the central Government (*s*). Nor need the distinctive mark consist of a regular uniform; although it must be a dress-mark clearly distinguishable, and one that cannot be assumed or dropped at will, such as a mere badge or cap (*t*). With respect to levies *en masse*, it is now provided that where the population of a territory that has not been occupied spontaneously take up arms to resist an invader, without having had time to organize themselves in accordance with the above-mentioned provisions, they shall be regarded as belligerents so long as they carry arms openly, and respect the laws and customs of war (*u*). In so far as these provisions do not apply, the earlier customary law (*x*) will be deemed to be applicable (*y*). Hence risings in occupied territory are still left to the operation of the earlier law, under which they are usually treated as penal (*z*). With respect to coloured troops, there is no reason why such troops should not be employed so long as they are properly disciplined and commanded by civilized officers (*a*); but the use of undisciplined or savage troops would be improper, except perhaps against savage foes (*b*).

(*p*) H. R. 1.

(*q*) The word used is "certificate": H. R. 3. 13.

(*r*) H. R. 1.

(*s*) Thus leaving the raising of small forces open to local initiative, provided the above conditions are complied with: see Bordwell, 233, 512, 513.

(*t*) Hall, 515.

(*u*) H. R. 2.

(*x*) As to which, see Hall, 517 *et seq.*

(*y*) *Supra*, p. 94.

(*z*) *Infra*, p. 110; Bordwell, 233.

(*a*) So the French employed Turcos in the Franco-German war, 1870; whilst the United States enrolled a negro regiment in the Spanish American war, 1898. Great Britain, however, refrained from employing Indian troops in the South African war, 1900.

(*b*) Taylor, 471.

Prohibited Methods of Warfare.

Generally. It is now fully recognized that the right of belligerents to employ means of injuring the enemy is not unlimited (*a*). Hence a variety of restrictions are imposed both on the methods and instruments of war. So, it is prohibited to use poison; to kill or wound treacherously (*b*); to refuse quarter or declare that no quarter will be given; or to seize or destroy private property of the enemy unless imperatively required by the necessities of war (*c*). So, too, one belligerent cannot compel the nationals of the other to take part in any operations of war directed against their own country, even though they may have been in his service prior to the war (*d*). The employment of ruses of war and other methods necessary to obtain information about the enemy is recognized as permissible (*e*). So, also, it is not forbidden to make improper use of a flag of truce, the national flag of the enemy, military emblems or signs that have a specific meaning, the enemy uniform (*f*), and the distinctive badges of the Geneva Convention (*g*).

As to Prohibited Weapons. It is forbidden, in general, to employ arms, projectiles, or material calculated to cause superfluous injury (*h*); and, in particular, to use projectiles of a weight below 400 grammes which are either explosive or charged with fulminating or inflammable substances (*i*). It is also forbidden, as between belligerents that are parties to the Hague Declarations, to use projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases (*k*); or bullets which expand or flatten easily in the human body, such as bullets with a hard envelope not entirely covering the core or pierced with incisions (*l*); or finally, to discharge projectiles and explosives from balloons, or by other new methods of a similar character (*m*).

(*a*) H. R. 22.

(*b*) The world includes assassination or the offer of a reward for one's "dead or alive." For instances of this in the case of wars with uncivilized tribes, see Holland, Letters on War and Neutrality, 52.

(*c*) H. R. 23. On the border, the property of neutrals is often seized and destroyed, and Oppenheim declares private property of neutrals which see Oppenheim, ii. 263. See H. R. 23 (*g*) and 52 (*a*). As to the limitations on these rights, see Oppenheim, ii. 164 *et seq.* Holland, War on Land, 41 *et seq.*

(*d*) See H. R. 23 (*h*). On the rights of neutrals and duties, see H. R. 53; Oppenheim, ii. 164 *et seq.*

(*e*) Ruses may take during war, unless care is taken to make such alterations as will guard against deception: see Holland, War on Land, 45. As to an alleged use of the methods of chivalry in 1904, see Holland, Letters on War and Neutrality, 50.

(*f*) H. R. 23 (*f*).

(*g*) That is, of the Red Cross, or other organization for the relief of individuals than to reduce the numbers of the enemy.

(*h*) See H. R. 23 (*e*), and the Declaration of St. Petersburg, 1868.

(*i*) H. D., No. 2 of 1899.

(*k*) H. D., No. 3 of 1899.

(*l*) H. D., No. 1 of 1907; although

(iii) *Bombardment and Devastation.* By the Hague Regulations, a belligerent is now forbidden to bombard or attack, by any means whatsoever, undefended towns, villages, habitations, or buildings (*p*); a prohibition which would appear to cover the case of bombardment by projectiles from balloons, irrespective of the Declaration previously mentioned. Before a place is bombarded, moreover, warning must be given to the local authorities, except in the case of an assault (*q*). In sieges and bombardments every precaution must be taken to spare so far as possible buildings devoted to religion, art, science and charity, historic monuments, hospitals and places where the sick and wounded are collected, so long as they are not used for military purposes; such places being indicated by special visible signs notified to the assailants (*r*). Pillage is, in all cases, forbidden (*s*). The legality of devastation appears to be left—save for the prohibition of the destruction of private property except where required by military necessity (*t*)—to the operation of the earlier law, under which it may only be resorted to in cases where it is either "a necessary concomitant of ordinary military action" or required for the purposes of self-preservation (*u*). When general devastation is resorted to, provision should so far as possible be made for the safety and maintenance of the population affected (*x*).

Spies and their Treatment.

A spy is one who, acting clandestinely or under false pretences, obtains or seeks to obtain information within the zone of operations of a belligerent, with the intention of communicating it to the enemy. But soldiers who penetrate the lines of an enemy without disguise; or soldiers or civilians bearing despatches who carry out their mission openly; or balloonists engaged in the delivery of despatches or in maintaining communications, cannot lawfully be treated as spies (*y*). It is quite legitimate to employ spies; but a spy, if caught, is liable, although only after being tried, to the punishment of death (*z*). The offence will, however, be purged if he succeeds in rejoining his own army, even though he may be captured afterwards (*a*). With spies we may class, as being liable to the punishment of death, persons engaged in negotiating betrayals, or desertions to the enemy (*b*).

Germany, France, Italy, Russia, and Japan are not parties to this Declaration.

(*p*) H. R. 25.

(*q*) H. R. 26.

(*r*) H. R. 27.

(*s*) H. R. 28, 47.

(*t*) H. R. 23 (*g*).

(*u*) Hall, 531 *et seq.*

As to the use of concentration camps in the South African war, and zones of refuge in the war in the Philippines, see Bordwell, 151, 155; and, on the question of concentration generally, Moore, Digest, vii. § 1126.

(*x*) H. R. 29. Nor can balloonists or aviators be treated as spies, consistently with this regulation, when engaged openly in scouting; see Oppenheim, ii. 197.

(*y*) H. R. 30.

(*z*) H. R. 31.

(*a*) As to the case of Major André, see Phill. iii. 172; and, on the subject generally, Hall, 535 *et seq.*; Oppenheim, ii. 196 *et seq.*

Non-Hostile Intercourse between Belligerents.

(i) *General Character and Conditions.*—The conduct of war under modern conditions almost necessarily involves some occasion for intercourse of a non-hostile character between the belligerents. The forms and methods of intercourse include: suspensions of arms, truces, armistices, capitulations, surrenders, and other military conventions: as well as the arrangement of cartels, the use of flags of truce, and the granting of passports, safe conducts, safeguards, and licenses (*a*) All such agreements, and the relations to which they give rise, are regarded as being *uberrimae fidei;* whilst some are also the subject of special rules, based either on custom or convention (*d*).

ii *Flags of Truce, Passports.* A flag of truce is used when one belligerent desires to enter into communication with the other: the proper symbol being a white flag. The other party is not bound to receive the bearer in all circumstances, as where this would interfere with his operations or reveal his position, although in such a case it is usual to announce the refusal by signal (*e*). But if once received, both the bearer and his attendants are inviolable; although they are subject to all necessary measures of precaution, and are liable to forfeit their privilege if they abuse their position (*f*). A passport is a written permission, issued usually by or under the authority of the belligerent Government, empowering an enemy subject to pass into or through the belligerent lines or territory (*g*). A safe conduct is a like permission, issued either by the belligerent Government or by a commanding officer, authorizing the passing either of a person or of property into some place otherwise prohibited (*h*).

iii *Suspensions of Arms, Truces and Armistices.* A suspension of arms is a cessation of hostilities for a short period or temporary purpose, as for a parley or for burying the dead. It may be entered into between any officers having separate commands, and applies only as between their own troops (*k*) A truce or armistice is a suspension of hostilities for a longer time or more general purpose (*l*) It may be either (1) general, in the sense of applying to all the forces of the belligerents, in which case it can only be made by the sovereign authority, exercised either directly or specially delegated (*m*); or (2) local, in the sense of applying only to forces within some particular locality, in which case it can be made by the

(*a*) Some of these relate specially to land, and others to both land and sea warfare.

(*b*) As to truces, capitulations and armistices, see H. R. 32–41; and, on the same subject generally, Halleck, ii. 310–334, and Hall, 538 *et seq.*

(*c*) Halleck, ii. 334.

(*d*) H. R. 32–34.

(*e*) Halleck, ii. 323; Hall, 539.

(*f*) Halleck, ii. 323; Hall, 539.

(*g*) Under the British and American practice no distinction is drawn between these.

(*h*) Halleck, ii. 311; Hall, 540.

(*k*) Halleck, ii. 311 *et seq.*; Hall, 540, 545.

(*m*) Such authority not being implied

chief officer locally in command, although subject to ratification by superior authority, and terminable on due notice of a refusal (*n*). An armistice must be duly notified both to the proper authorities, and to the troops themselves; and all hostilities must cease as from the time of notification, unless some other time has been agreed on (*o*). The terms of an armistice, with respect to the continuance of works or fortifications and the question of revictualling, ought to be specifically agreed upon; but in default of express agreement, certain conditions are implied by usage (*p*). Any serious violation of the armistice by one party will justify the other in denouncing it, or even in recommencing hostilities without notice (*q*); but an unauthorized violation by individuals will only justify a demand for reparation, and, if wittingly committed, a demand for the punishment of the guilty parties (*r*). If no special time is agreed on for the duration of the armistice, either party may terminate it by notice (*s*).

iv) *Capitulations and Surrenders.*—A capitulation is an agreement for the surrender of an entire army, a body of troops, or a fortress, upon conditions. Such conditions will necessarily vary according to the relative position of the parties; but they must accord with the rules of military honour; and when once settled they must be scrupulously observed on either side (*t*). Such an agreement may be entered into by any officer having a separate command; but, if it contains stipulations of an unusual character, exceeding the authority of the officer in question—as where the victor concedes terms more favourable than a surrender "with the honours of war," or where the vanquished commander agrees that his troops shall not serve again against the same enemy (*u*)—then the capitulation will need to be ratified either by the sovereign authority or by the commander-in-chief, and will be revocable if such ratification is refused (*x*). It is an implied condition that the capitulating force shall not destroy any works, arms, stores, or ammunition in their possession, after the conclusion of the agreement (*y*). A surrender during an engagement is sometimes indicated by a white flag; but the most effective token, whether with or without the exhibition of a white flag, consists in the actual laying down of arms (*z*).

Hostages. It was formerly the practice to take hostages as a means of securing the due fulfilment of compacts of war; but this practice has now been generally abandoned. Hostages, however,

(*n*) H. R. 37; Halleck, ii. 342; Holl. 541–545.
(*o*) H. R. 38.
(*p*) H. R. 39. As to supplies see Halleck, ii. 344; Holl. 541 *et seq.*
(*q*) H. R. 40.
(*r*) H. R. 41; Holl. 545.
(*s*) H. R. 36.
(*t*) H. R. 35.
(*u*) Holland, War on Land, 50.
(*x*) Hall, 548–549. As to the capitulation of El Arisch, see Hall, 548, and Halleck, i. 278; and, as to the capitulation of Versailles, *ibid.* ii. 319, n. 2.
(*y*) Holland, War on Land, 50.
(*z*) As to charges arising out of a failure to appreciate this during the South African war, see Baty, International Law in South Africa, 79 *et seq.*

are still taken to ensure the prompt payment of contributions and requisitions; or as a guarantee against insurrection or other unlawful acts in occupied territory (*a*). But their use to cover a retreat, or as a protection against legitimate hostilities, is, in principle at any rate, illegal. Hostages may not in any case be put to death, and should be treated as prisoners of war; although usually subjected to a more rigorous confinement (*b*).

The Treatment of the Wounded and Sick.

[*Under the Customary Law.* Long prior to the birth of international law, it came to be recognized that enemies disabled by wounds or sickness ought not to be killed or illtreated (*c*). A further advance was made when the duty of ministering to the needs of the wounded came to be undertaken by religious bodies (*d*). But it was long before this came to be recognized as a duty incumbent on the belligerents themselves. The Swedes, under Gustavus Adolphus, were probably the first to recognize such an obligation, but it was not until the 18th century that its recognition became general. This gradual transformation of what was originally only a dictate of humanity into a positive duty was due to the growth of humane sentiment, which reprobated generally the harsher practices of war that had characterized the earlier period, even though they were occasionally revived (*e*). But here, as in other branches of international law, the transition was effected largely by the aid of treaties and conventions (*f*). Even when the duty came to be recognized, however, there was at first no adequate organization for giving effect to it (*g*). The origin of the present system is probably traceable to the humane impulses and efforts of a number of philanthropic individuals (*h*) and bodies (*i*). As the result of these efforts a semi-official Conference was held at Geneva in 1863, which after careful consideration, recommended that in all countries there should be established a new organization, comprising committees of succour for the sick and wounded; and that all ambulances, hospitals, and

(*a*) See p. 116, *ante*.

(*b*) On this subject generally, see Hall, 441, 479; Op. Attorney-General, U. S., 317; *ex parte* Weschke, U. S., 1902; 1 Bedwell, 305.

[illegible] although [illegible] frequently disregard [illegible] practice.

(*c*) [illegible] p. 100, *ante*, [illegible] of the Order of the Teutonic Knights, [illegible] Venice, [illegible] Italian [illegible] in 1674 and 1676.

(*d*) [illegible] 1584, [illegible] some 300 nuns [illegible] to have been established, primarily for the [illegible] and wounded in war.

(*e*) The first example [illegible] was probably afforded by the improvements of system wrought by the Sanitary Commission appointed by Great Britain during the Crimean war, and by the United States during the Civil war.

(*f*) Such as M. Dunant, of Geneva, the author of *Le Souvenir de Solferino*, which recounted the sufferings of the wounded after that battle, and is probably one of the few books that have influenced to any great world movement. M. Arnaudin, in France, and Dr. Palasciano, in Italy, see Bedwell, 84.

(*g*) See as to the Geneva Society of Public Utility, under the presidency of M. Moynier.

members of the staff, together with their assistants, should be neutralized, subject to the use of some common flag or badge to be internationally agreed on. The first of these recommendations bore fruit in the establishment soon afterwards in different countries of a large number of Voluntary Aid societies, having for their object the relief of the wounded and sick in time of war; whilst the second resulted in the summoning, through the medium of the Swiss Government, of the Congress which framed the Geneva Convention of 1864.

(iii) *The Geneva Convention*, 1864, *and the Supplementary Convention*, 1868. The Geneva Convention of 1864, is noteworthy both as a tribute to the humane spirit of the age that produced it, and as constituting the first step towards the codification of the law of land warfare. The principles which it embodied, although now revised and amended, still constitute the foundation of the existing law. Briefly and in effect it imposed on belligerents a positive duty of providing all necessary means for the protection and succour of the wounded and sick. These, whatever their nationality, were required to be collected and cared for, and, on their recovery and if unfit for further service, to be sent back to their own country. All hospitals and ambulances, as well as all persons employed in the service of the wounded and sick, were neutralized and protected, subject to their being designated either by a distinctive flag or badge, as the case might be, bearing the device of a red cross on a white ground; this having been chosen not as a religious emblem but by way of compliment to Switzerland (*q.v.*). Certain privileges and immunities were also conferred on such of the local inhabitants as might afford succour and shelter to the wounded or sick. This Convention, although originally adopted only by sixteen Powers, was subsequently acceded to by nearly all civilized States, and is still in force as regards such of the signatories as have not acceded to the subsequent Convention of 1906. The Convention was, however, marked by certain imperfections, in so far as the terms in which it was expressed were in some respects inexact or ambiguous; whilst it made no provision for naval war. In 1868, a fresh Conference was held at Geneva, with the result that another Convention was framed, supplementing and revising that of 1864, and extending its principles to naval war; but this Convention, although not without its influence on subsequent practice, was never formally adopted.[1] Meanwhile, with the lapse of time, the earlier Convention was found to have grown out of harmony with existing military arrangements and conditions. The whole subject came again under consideration at the Hague Conference of 1899, with the result that a new Convention "for the adaptation of the principles of the Geneva Convention to maritime war," No. 3 of 1899, was drawn up; whilst a wish was also expressed that a special Conference should be summoned by the Swiss Government for revising the Convention of 1864 with respect to land war. This project of revision was in fact accom-

[1] See G. C. 1906, Art. 18.

plished by a Conference held at Geneva in 1906, which was attended by some thirty-seven States, and which produced the Geneva Convention of 1906. Finally, in 1907, the Convention framed by the first Hague Conference with respect to maritime war, was replaced by the corresponding Convention, No. 10 of 1907.

iii. *The Geneva Convention of* 1906.—The more important provisions of the Geneva Convention of 1906 may be grouped as follows: (1) The wounded and sick on either side are to be respected and cared for by the belligerent in whose power they actually are; although the duty is imposed on a belligerent who is compelled to abandon his wounded of making, so far as possible, due provision for their needs from his own staff and equipment (*l*). Nevertheless, each belligerent is entitled, unless it has been otherwise agreed, to hold any wounded or sick belonging to the enemy who may be in his power, as prisoners of war (*m*). (2) A belligerent remaining in possession of the battlefield must take steps to protect the wounded and dead against maltreatment and pillage; and must, so far as possible, examine and identify the dead prior to burial (*n*). Each belligerent is required to notify to the other the names and subsequent disposal or fate of the wounded and sick left in his hands, and to return the private property of those who may die (*o*). (3) The assistance of the local inhabitants may be invoked for the succour and nursing of the wounded, and special immunities may be granted to those who respond (*p*). (4) Both "mobile medical units" (*q*) and "fixed establishments" (*r*) are to be respected and protected, subject to their not being used for injury to the enemy (*s*). (5) All persons exclusively engaged in the care of the wounded and sick, including doctors and chaplains, are to be respected and protected (*t*). Persons so engaged cannot, if taken, be held as prisoners of war; although they may be required to discharge their functions so long as may be necessary, receiving, if members of the regular staff, the pay usual in the captors' army; but thereafter they must be sent back, together with their personal property, to their own army or country (*u*). Members of Voluntary Aid societies authorized to act by their Government, and whose names have been notified to the other belligerent, are placed on a similar footing, although they too are subject to military law (*v*). Neutral societies assisting either belligerent must

(*l*) Art. 1.
(*m*) Art. 2.
(*n*) Art. 3.
(*o*) Art. 4.
(*p*) Art. 5.
(*q*) These "mobile medical organizations" are field hospitals, which follow the troops into the field: see Holland, War on Land, 30.
(*r*) These "fixed establishments" are general hospitals, whether actually movable or not, stationed on the lines of communications or at a base.
(*s*) Arts. 6, 7, 8. Hospitals, if they fall into the hands of the enemy, may be appropriated, but may not generally be diverted to other uses: the "matériel" of field hospitals may also be temporarily used for the same purpose; whilst the "matériel" of voluntary aid societies is subject to requisition: see Arts. 14–16; and as to the treatment of convoys of evacuation, Art. 17.
(*t*) Art. 9.
(*u*) Arts. 12, 13.
(*v*) Art. 10.

be authorized both by that belligerent and by their own Government; and their names must be notified to the other belligerent (*y*). (6) By way of compliment to Switzerland the device of a red cross on a white ground is retained as the emblem and distinctive sign of the medical or hospital service (*z*). This mark is to be worn, as a badge, by those employed in that service, and also to be hoisted, as a flag, over all its establishments under conditions prescribed by the Convention (*a*); whilst it is forbidden to employ that particular device, either in peace or war, for any other purpose (*b*). The signatory Powers undertake to issue the necessary instructions to their military forces with respect to the requirements of the Convention; and to bring them to the knowledge of the civil population (*c*). They further undertake to adopt all necessary measures for preventing either pillage or the maltreatment of the wounded or sick, and for punishing the improper use of the Red Cross flag and armlet by persons not entitled to its protection (*d*). The Conference also put on record a desire that differences arising as to the interpretation of the Convention should, if cases and circumstances permitted, be submitted to the Permanent Court (*e*). This Convention, it will be seen, marks a distinct advance, both in form and substance, on the earlier Convention of 1864. It provides for the policing of the battlefield, the identification of the dead, and the recognition of Voluntary Aid societies; whilst it is also, in its technical parts, more in harmony with modern military conditions (*f*).

Prisoners of War.

Under the Hague Regulations prisoners of war are to be regarded as prisoners of the State (*g*); they must be humanely treated; and are at liberty to retain all their personal belongings, with the exception of arms, horses and military papers (*h*). Every prisoner is

(*y*) Art. 11.

(*z*) Arts. 18, 19. Turkey, however, proposes to continue the use of the Red Crescent, whilst undertaking to respect the inviolability of the Red Cross.

(*a*) Arts. 20–22.

(*b*) Art. 23. The desire was to prevent its use for commercial purposes as a label or trade mark. Great Britain, whilst approving the principle, signed the Convention under reservation of this provision, as well as of such provisions of Arts. 27 and 28 as require the signatories to give effect to it under the municipal law. Nevertheless, by 1 & 2 Geo. V., c. 20, the future use of the emblem of the Red Cross on a white ground is forbidden; saving the right of proprietors who registered before the Act to continue its use for four years from the passing thereof.

(*c*) Art. 26.

(*d*) Arts. 27, 28.

(*e*) See the final protocol of the Convention; but Great Britain and Japan did not accept this; see an article by Prof. Holland, *Contemporary Review*, August, 1907.

(*f*) It has already been ratified by twenty-one States, including all the great Powers, with the exception of France; whilst it would appear, by virtue of Art. 21 of the Regulations annexed to the Convention, No. 4 of 1907, to be binding on all the signatories of that Convention, irrespective of its specific adoption, although this is not universally admitted: see Holland, War on Land, 27; and, generally, Bordwell, 181 *et seq.*

(*g*) And not of the captor.

(*h*) H. R. 4.

bound, if questioned, to declare his true name and rank (*l*). They are to be interned in a town, fortress, camp or other place; but must not be imprisoned, except in so far and for so long as necessity requires (*k*). They must be maintained by the Government of the captor, and, in default of special agreement between the belligerents, on the same footing, as regards food, quarters, and clothing, as the captor's own forces (*l*). In general they may be required to work, but their tasks must not be excessive, or connected with the operations of the war. They may also be authorized to work for public bodies, private persons, or on their own account, receiving pay according to a scale indicated generally by the regulations; in which case their earnings are to be applied to improving their position, whilst any balance, after deducting the cost of their maintenance, will be payable to them on their release (*m*). Officers are to receive pay at the rates in force in the captor's army, this amount being repayable by their own Government (*n*). All prisoners of war are subject to the military laws in force in the captor's State. For insubordination, revolt, or conspiracy (*o*) they are liable to punishment of such severity as may be necessary; but, for attempts to escape, only to disciplinary treatment; whilst a prisoner who succeeds in escaping is not liable to punishment if captured anew (*p*). They may be released on parole if the laws of their own country sanction this. Such release cannot be forced on a prisoner; but if accepted both he and his Government are bound to a scrupulous observance of the engagement; and, on default, the former will, if retaken, forfeit all right to be treated as a prisoner of war and may also be tried before the military Courts (*q*). When persons who follow an army without belonging to it, such as newspaper correspondents, sutlers, and contractors, are captured, they are, if detained at all, entitled to be treated as prisoners of war, subject to their possessing a certificate from the military authorities of the army which they were accompanying (*r*). A bureau of information is to be instituted by each of the belligerents, and also in any neutral country where belligerent forces may be interned, for the purpose of affording information as to the disposal and fate of prisoners of war. This bureau is also required to collect all objects of personal use, money, letters, &c. found on the battlefields or left by prisoners who have died or been released or exchanged, and to forward them to those interested (*s*). All possible facilities are to be given to duly constituted relief societies and their agents, subject to certain prescribed conditions (*t*).

(*i*) H. R. 9.
(*k*) H. R. 5.
H. R. 7.
(*l*) H. R. 6.
(*m*) H. R. 17.
(*n*) As to certain exceptions by the British military authorities on this ground during the Boer war, see Holland, Letters on War and Neutrality, 66–68.
(*o*) H. R. 8.
(*p*) H. R. 10, 11, 12.
(*q*) H. R. 13.
(*r*) H. R. 14. As to the working of this bureau, under the corresponding Convention of 1899, during the Russo-Japanese war, see Takahashi, 111 *et seq.*
(*s*) H. R. 15.

The ordinary charges on letters or parcels intended for prisoners are to be waived (*w*). Prisoners are to enjoy complete liberty of worship, provided they observe the regulations for order and police issued by the military authority (*x*). After the conclusion of peace the repatriation of prisoners must be carried out as speedily as possible (*y*); save as regards those who are detained for debts, common law crimes, and as some contend offences against discipline (*z*). The exchange of prisoners as between the belligerents is usually regulated by cartels (*a*); commissaries being appointed on either side to supervise their execution (*b*).

Military Authority over Hostile Territory.

The distinction between "Occupied" and "Non-Occupied" Territory.—The rights and duties of a belligerent invader over the hostile territory and its inhabitants vary greatly according to his position. Mere invasion without occupation confers on him only rights over persons and property within his reach. But if the invasion is followed by occupation, he then acquires a territorial status which—even though only temporary and provisional in character—confers on him an additional power and authority together with certain incidental duties; these rights and duties being the subject of special rules, which are now embodied in the Hague Regulations (*c*). Finally, if the occupation is followed by conquest and annexation, then the invader will become invested with the rights of sovereignty and dominion; this being, however, a subject which belongs to a different department of the law of war (*d*).

Non-Occupied Territory. The inhabitants of the invaded territory, if non-combatants, ought not to be molested, and should be protected against spoliation and rapine. Family honour, the lives of individuals and private property, as well as religious convictions, and liberty of worship must be respected (*e*). Pillage is formally interdicted (*f*). Nor can nationals be compelled to take part in operations of war directed against their own country (*g*); or to furnish information as to the army of their own country or its

(*w*) H. R. 16.

(*x*) H. R. 18.

(*y*) H. R. 20; although this would not apply to prisoners who had become subjects of the captor State by annexation.

(*z*) Westlake, ii. 67. In 1871 Germany claimed and exercised the right of detaining prisoners convicted of disciplinary offences until they had fulfilled their sentences; but on the conclusion of the Russo-Japanese war no such claim appears to have been made. In principle it would seem that the right of detention comes to an end, at any rate as regards mere disciplinary offences, with the termination of the war. As to war crimes, see p. 111, *infra*.

(*a*) Halleck, ii. 326; *infra*, p. 170.

(*b*) As to the usual terms of exchange and as to controversies that have arisen in relation thereto, see Hall, 408.

(*c*) See Sect. III. Arts. 42–56; although this section really includes some regulations that apply equally to "non-occupied" territory.

(*d*) *Infra*, p. 245.

(*e*) H. R. 46.

(*f*) H. R. 47.

(*g*) H. R. 23, par. 2

means of defence (*h*). For the rest, however, the inhabitants of the invaded territory will be subject to all risks incident to the conduct of hostilities. The seizure of property by the invader, whether as the property of the enemy State, or as being required for military use, is subject to similar rules to those which apply in the case of "occupied" territory (*i*).

Occupied Territory: The Scope of Occupation. Under the Hague Regulations territory will be deemed to be "occupied" only when it is actually placed under the authority of the invader; and the consequences of occupation will only apply where such authority is established and can be exercised (*k*). This serves to make it clear that "occupation," if it is to carry the rights which attach to it under the law of war, must be supported by a force sufficient to maintain the authority of the occupant (*l*); and that it will terminate at the point at which that force ceases to be effective. Hence, a belligerent cannot claim to exercise the rights of an occupant merely by proclaiming territory to be in occupation; nor can he extend the limits of a genuine occupation by claiming to be in "constructive" occupation of adjoining territory where his authority is not in fact effective (*m*). Acts done outside these limits, even though otherwise within the competence of a belligerent, may be annulled on his withdrawal (*n*); whilst, in so far as they are incapable of being annulled, they would afford a good ground for a claim for compensation, which, having regard to the terms of the Hague Convention, would not appear to be affected by the conclusion of peace (*o*).

The legal effects of Occupation. There has been much variation of theory and practice, as regards the effects of military occupation on the rights and duties of the occupant (*p*). But it is now generally recognized as conferring on the occupant only a temporary or provisional status, which has the effect of suspending the authority of the legitimate Government within the sphere of occupation, and of investing the occupant with certain powers and responsibilities, which rest in part on military necessity and in part on the abeyance for the time being of all other authority (*q*). These are shortly: (1) a right, which is however attended by a correlative duty, to provide for the government of the territory in question; (2) a right to exercise control over the inhabitants; and (3) a right to utilize the resources of the

(*h*) H. R. 44. Germany, Russia, Austria, Hungary, and Japan signed under reservation of this Article: see Holland, War on Land, 53. As to the general course of discussion on these Articles, and as to compulsory employment as guides, see Pearce Higgins, 265 *et seq.*

(*i*) The restrictions attaching to the more stable position being necessarily implied as regards the less stable.

(*k*) See H. R. 42; and as to the earlier customary law, Hall, 476.

(*l*) As to the analogy of blockade, see p. 106, *infra*.

(*m*) Hall, 478.

(*n*) As to the annulment of acts done in excess of the rights of occupancy, see *infra*, p. 255.

(*o*) As where taxes had been collected outside the limits of actual occupancy. See H. C., No. 4 of 1907, Art. 3.

(*p*) Hall, 463, 465, 469.

(*q*) Hall, 463; Latifi, 13.

country so far as military needs may require, and subject to the conditions and limitations mentioned below (*r*).

(1) *The right to govern.* The authority of the legitimate Government passes temporarily into the hands of the occupant. The latter, however, is expressly forbidden to exact any oath of allegiance from the population of the occupied territory (*s*). He is also required to take all steps in his power to establish and ensure so far as possible public order and safety, whilst respecting, unless absolutely prevented, the laws already in force (*t*). In effect, this means that in all matters affecting the safety of the army of occupation and the success of its operations, the territorial law is liable to be replaced by martial law, in the sense and subject to the conditions previously described (*u*); although in other matters the territorial law, and especially that part of it which affects the civil relations of the inhabitants to each other, ought not to be interfered with (*x*). In the matter of judicature, also, a belligerent in occupation may, so far as military needs require, replace the ordinary courts by military courts and procedure; but in other respects he should allow the former to continue their functions, and may not even require them to exercise their functions in his name (*y*). In the matter of administration, supreme control necessarily passes to the occupant, although he is required to conduct it, so far as possible, on the same lines as before, and when practicable through the agency of such of the local officials as are willing to remain. From such officials the occupant may exact a limited oath of obedience, as, for example, not to use these powers to his detriment; but he cannot require them to exercise their powers in his name, or require them to do acts that conflict with their duty to their own country (*z*).

(2) *The control of the inhabitants.* Although the occupation of enemy territory confers on the occupant a right of supreme control, this, resting as it does on avowed force, does not carry any duty of obedience on the part of the inhabitants except such as may be dictated by prudence (*a*). In the exercise of this power the occupant commonly treats all acts of hostility against himself as punishable. Acts already forbidden to non-combatants by the laws of war, such as the killing or wounding of his soldiers, the destruction of roads, bridges, telegraphs, the wrecking of trains, and the burn-

(*r*) *Infra*, p. 110.
(*s*) H. R. 45.
(*t*) H. R. 43.
Supra, p. 51.
(*u*) This is probably the meaning of H. R. 23 (*h*), previously referred to: see p. 85, *supra*.
(*x*) As to a dispute on this subject and an appropriate method of solution, see Hall, 471; and Oppenheim, ii. 214.
For this reason, the higher political officials and railway and telegraph officials almost invariably withdraw of their own accord or are suspended by the occupant. As to the different classes of officials and their obligations in this respect, see Bordwell, 307 *et seq.*
(*a*) Some writers, indeed, assert a legal duty of obedience on the part of the inhabitants, apart from the force which compels this; whilst others limit this to such acts of the occupant as are directed to the maintenance of public order: see Bordwell, 309.

ing of soldiers' stores or quarters, are invariably prohibited under the penalty of death. Other acts, such as spying on the occupant, misleading his troops, or giving information to the enemy, even though not forbidden by the laws of war, are made similarly punishable. The inhabitants of districts in which such offences are committed, moreover, may be held collectively responsible; although this is now subject to the restriction imposed by the Hague Regulations, which provide, in effect, that no general penalty, pecuniary or otherwise, shall be inflicted on the population at large for acts done by individuals, except on actual or presumptive evidence of knowledge or connivance (*b*). The use of hostages on trains, in order to prevent train-wrecking by the inhabitants of occupied territory, is in principle permissible, although generally reprobated and little likely to prove efficacious in practice (*c*). But if the inhabitants rise in insurrection, whether in large or small bodies, they cannot claim to be treated as legitimate combatants (*d*); although this would not apply to a case where the occupation was in fact shown to be ineffective (*e*). All arms and munitions of war are required to be delivered up; and the mere possession of arms is made an offence. Leaving the territory to join the forces of the enemy may also be forbidden, and is often punished, although improperly, by vicarious penalties. Troops may be quartered on the local inhabitants. The services of the latter may also be requisitioned (*f*); although it is forbidden, as well in occupied as in non-occupied territory, to compel them to take part in operations, or to give information, against their own country (*g*).

3. *The use of the resources of the country:* (a) *The seizure of property.*—Immovable property belonging to the enemy State, including public buildings, forests, and agricultural undertakings, may be taken possession of; although the occupant, in such a case, will only be deemed to acquire a *usufruct*, and must administer the property according to the rules of *usufruct* (*h*). Cash, funds and realizable securities (*i*) belonging to the State may also be seized and appropriated, together with depôts of arms, means of transport, stores and supplies, and such other property as may be of use for

[illegible] State, or [illegible] is exempted to be [illegible] H. R. 59, for the actual [illegible] which [illegible] Art. ii. See also [illegible] i. 65.

[illegible] Bordwell, 265; and as [illegible] the Franco-German [illegible] South African war, [illegible] 251.

[illegible] [illegible] [illegible] expel [illegible] H. R. 2.

[illegible] [illegible] [illegible] [

military operations (*k*). But property belonging to local bodies, or to institutions dedicated to religion, science, art, charity, or education, even though ultimately vested in the State, must be treated as private property; whilst the seizure, destruction, or intentional injury of historical monuments or works of art or science, is expressly forbidden (*l*). As regards private property, all forms of pillage are formally prohibited (*m*); and it is expressly provided that private property shall not be confiscated (*n*). This apparent immunity is, however, subject to considerable qualification. Land and buildings belonging to private owners may be temporarily used by an invader for purposes required by military necessity. And, apart from cases governed by maritime law (*o*), an invader may also seize arms, ammunition, and all other kinds of war material, even though belonging to private persons, as well as any appliances for the transport of persons or goods by land or sea or air (*p*). But if any such property is seized, it must, if still *in esse*, be restored on the restoration of peace; whilst in any case an indemnity must be paid in respect of its use or consumption, although it is apparently left to the treaty of peace to determine by which party the indemnity shall be paid (*q*). In addition to this, private property is subject to contributions and requisitions, and to penalties imposed by military authority, under the conditions described below (*r*). The invader may also seize and use neutral property temporarily found within his jurisdiction; although subject to a duty of restitution, if that be possible, after the need for it has ceased, and, in any case, subject to the payment of a proper indemnity (*s*).

(b) *The collection of taxes.* The Hague Regulations, whilst not expressly conferring on the occupant a right to collect taxes, yet recognize the practice of doing so; and, on this assumption, provide that if the occupant collects taxes, dues and tolls, "imposed for the benefit of the State" (*t*), he shall follow, so far as possible, the rules of assessment and incidence previously in force, and shall also defray the expenses of administration to the same extent as the legitimate Government was bound to do (*u*).

(c) *The levy of contributions and requisitions.* Contributions are payments in money, over and above the ordinary taxes, levied by a belligerent on the inhabitants or on localities within his control. Such contributions may now be imposed only for the needs of the

(*k*) H. R. 53.

(*l*) And is, indeed, made penal; H. R. 56.

(*m*) H. R. 47.

(*n*) H. R. 46.

As to which, see p. 134, *ante*.

(*o*) The effect of this appears to be that sea-going vessels, which are ordinarily the subject of maritime capture, may also be seized by land forces, if found within their reach, under the conditions prescribed by the present article; see Bordwell, 327.

(*p*) H. R. 53.

(*q*) *Infra*, p. 112.

As to the case of railway stock and submarine cables, see p. 268–9, *infra*, *sub nom.* Angary.

(*r*) Thus by implication excluding his right to levy rates imposed by local authorities; see Holland, War on Land, 54; Westlake, ii. 94.

(*s*) H. R. 48.

army, or to meet the expenses of administration, and not for the mere purpose of enriching the invader (*x*). They can only be levied under a written order and on the responsibility of the Commander-in-Chief; they must be levied, as far as possible, in accordance with the rules as of assessment and incidence previously in force; and for every contribution a receipt must be given (*y*). The last condition, however, does not carry a right to indemnity, whether against the belligerent invader or the territorial Power; although reimbursement is frequently made by the latter with a view to equalizing the losses of war. Requisitions are demands made on the inhabitants or on localities, either for articles, such as food, clothing or instruments of transport; or for services, such as those required of labourers and drivers, or those involved in the working of the railways, posts and telegraphs (*z*). Requisitions may be made on the authority of the Commander in the locality occupied; but they can only be made for articles or services needed by the army of occupation; and must not be out of proportion to the resources of the country, or such as to involve the inhabitants in an obligation to take part in "military" operations against their own country (*a*). It is expressly provided that supplies in kind must, so far as possible, be paid for in cash, and that in default of this a receipt must be given and payment made as soon as possible (*b*). This regulation, it will be seen, although it expresses the desirability of paying for supplies in cash, does not impose any specific obligation to do so. It is, however, generally politic on the part of the belligerent to pay for supplies in cash, because it produces a more ready compliance with requisitions; whilst he can generally indemnify himself for the payment by levying a contribution on the district at large. If this is not done, then the question of payment ought strictly to be arranged for by the treaty of peace. Demands for contributions, and also for requisitions of any magnitude, are usually addressed to the local authorities, who are required to apportion the levy amongst the inhabitants, and to see that the demand is complied with. Compliance is sometimes enforced, *inter alia*, by the taking of hostages (*c*).

Violations of the Laws and Customs of War and their Remedy.

The laws of war may be violated either by a belligerent Government, as where hostilities are commenced without due notice, or some

(*x*) H. R. 49. As to the unsparing use of this right by the Germans in the war of 1870, see Bonfils, 906.

(*y*) H. R. 51.

Although only in so far as this is required for military purposes.

(*z*) See H. R. 52, which is worded less strictly than H. R. 6 relative to prisoners' labour (*see* p. 106), and does not appear to exclude labour on roads, bridges, and railways, even though it may relate to military operations; see Westlake, ii. 101.

(*a*) H. R. 52.

(*b*) See p. 101-2, *n.* (*y*), and on the subject generally, Westlake, ii. 83 *et seq.* Oppenheim, ii. 183 *et seq.*

unlawful method of warfare, such as privateering, is resorted to; or by a belligerent commander or the forces under his control, as where quarter is refused, or forbidden weapons are employed; or by individuals, either without official sanction, or in circumstances where no official sanction will suffice to exempt the individual wrong-doer, as where parole is broken or assassination attempted. By the Hague Convention, No. 4 of 1907, Art. 3, it is provided that a belligerent who violates the regulations shall, if the case demand, be liable to make compensation; and also that each belligerent shall be responsible for all acts committed by persons forming part of armed forces (*d*). But these provisions, although valuable as attesting the obligatory character of the regulations, provide no machinery whereby the obligation may be given effect to. As regards violations by a belligerent Government, a remedy may in certain circumstances be found in a resort to reprisals (*e*); but in a case where reprisals would not apply or avail, relief can only be sought in protest and by appeal to the judgment of civilized States (*f*). The efficacy of such an appeal, as a deterrent, is even now not inconsiderable, and will probably grow in strength as time proceeds, both on account of the increasing fear of neutral disfavour, and for the reason that in so far as the rules of war are now embodied in convention all signatories have a common interest in ensuring their observance. As regards violations by a belligerent commander or the forces under his control, protest may be made either to the commander himself, or to the belligerent Government; whilst in default of satisfaction, and in extreme cases, recourse may be had to reprisals (*g*). These consist in acts of retaliation—not necessarily similar in character to the acts complained of—which are exercised either against persons otherwise innocent, as where prisoners of war are put to death; or against property, as where villages or houses are destroyed on account of offences committed in or near them. But reprisals can in general only be authorized by the Commander-in-Chief; and should only be resorted to after careful inquiry into and on clear proof of the violations complained of, and in cases where no other redress is obtainable; whilst they ought not in any case to exceed in severity the acts complained of (*h*). As regards violations by individuals, these ought to be punished by the belligerent to whose forces the offenders belong, either of his own motion, or on complaint and proof by the other belligerent (*i*); whilst if the offenders, not having been already punished, are subsequently captured and can be identified, they may

(*d*) These provisions would appear in principle to be equally applicable to breaches of other Conventions relating to the conduct of war: see Holland, War on Land, 19.

(*e*) As in the case where one belligerent has recourse to illegitimate methods of warfare.

(*f*) Such as that made by Russia at the outbreak of the Russo-Japanese war in 1904, although in that case probably unfounded: see p. 5, *ante*.

(*g*) As to the possible punishment of the commander himself if captured see Oppenheim, ii. 310.

(*h*) Holland, War on Land, 61; Westlake, ii. 112; Oppenheim, ii. 305.

(*i*) See H. C., No. 4 of 1907, Arts. 1, 3; also G. C., 1906, Art. 28.

be punished by the belligerent aggrieved. In the matter of punishment, the fact of such illegal acts having been done by official orders will not in general suffice to exempt individuals who are shown to have been implicated therein; unless, indeed, the act was collective and its illegality not sufficiently obvious to be capable of being appreciated by individual soldiers (*k*).

War Crimes.

The term "war crimes" is commonly applied to acts done by individuals or bodies of individuals, which, whether legitimate or not as acts of war, will expose those who do them, if captured, to punishment, as distinct from mere detention. These include (1) acts of war committed by unauthorized persons, as where non-combatants engage in hostilities or the inhabitants of occupied territory rise in insurrection; (2) acts forbidden by the laws of war, whether committed by combatants or non-combatants, such as assassination, marauding, and treachery in cases where the laws of war imply good faith; and (3) acts not forbidden by the laws of war, but made penal by reason of the menace which they involve, such as espionage, attempts to induce desertion or betrayal, and the intentional misguiding of troops (*l*). When punishment, other than capital, has been inflicted for such offences, it would seem that it is strictly not vacated by the restoration of peace (*m*).

EXCURSUS II. THE CONDUCT OF WAR BY SEA, WITH SPECIAL REFERENCE TO RECENT CONVENTIONS.

The Scope of Maritime Warfare.

The conduct of war by sea includes not only those measures of offence and defence which are common to war both by land and sea; but also the seizure and appropriation of enemy merchant vessels, and of such cargoes belonging to the enemy and not protected by the neutral flag; as well as the visit and search of neutral merchant vessels and their cargoes, and the appropriation of such of them as may prove to be engaged in acts which a belligerent is entitled to restrain. Hence,

(*k*) As in cases of illegal bombardment or devastation: see Holland, War on Land, 60.

(*l*) Hall, 110; Taylor, 535; Oppenheim, ii. 309. The term "war treason," although in strictness there can be no treason in war, sometimes used to cover acts of this kind, and also although in this case improperly, offences committed by the inhabitants against an army in occupation. On the subject of "war treason," see Oppenheim, ii. 314; Westlake, ii. 90.

(*m*) Oppenheim, ii. 270.

although the conduct of war by land and sea is governed in some respects by similar rules (*a*), yet the latter possesses certain distinctive features, which are attributable, in part, to the different conditions under which it is waged; in part, to the retention of the right of capturing private property; and in part also to the fact that neutral interests are here more largely and directly involved than in war on land. These form the subject of special rules, which may be said to constitute the maritime portion of the law of war.

The Development of a Law of Maritime Warfare.

The development of a law of maritime warfare resembles, in its general outline, that of the law of war on land. But there are also certain notable differences. In the first place, the emergence of definite customs regulating belligerent action on the sea began much earlier; for the germ of these customs is to be found in those bodies of maritime usage which—long before the rise of international law and in deference to the influence and cosmopolitan connections of the merchant class—established themselves in different parts of Europe, and were even recognized as having the force of law, as then understood, irrespective of national boundaries (*b*). In the second place, the customs of maritime war, although they did not escape the attention or the influence of the text writers, were developed more largely than any other branch of international law by the action of the Courts, and especially by the Prize Courts which were established at a comparatively early period in different countries for the purpose of deciding on the validity of maritime captures. Finally, in the various customs relating to maritime war, and especially in those that touch on the relations of belligerents to neutrals, we notice an even greater divergence in the practice of States or groups of States than in those affecting land warfare; for which reason the task of establishing uniform rules by way of convention was attended by greater difficulty; and had, indeed, prior to the Declaration of London, achieved a smaller measure of success (*c*). It will, however, be convenient, at the present stage, to exclude from our consideration those parts of the law of maritime war which are especially concerned with the relations of belligerents and neutrals, as being more appropriate to the subject of neutrality.

The Sources of the Existing Law.

The rules governing the conduct of war by sea also comprise a written and an unwritten element. The former consists of rules now embodied in various international Conventions and Declarations, whilst the latter consists of rules that still rest on custom and mari-

(*a*) *Ante*, p. 116.

(*b*) As to these early maritime codes, see Manning, 15 *et seq.*; Taylor, 39 *et seq.*

(*c*) On the subject generally, see Westlake, ii. 120 *et seq.*

time tradition. There are, however, some rules derived from each of these sources which apply equally to warfare on sea and land. So, the Declaration of St. Petersburg, 1868 (*d*), and the Hague Declarations (*e*), are applicable to both kinds of warfare. Again, there are rules such as those prohibiting assassination, poisoning and the refusal of quarter, and those regulating the treatment of prisoners of war which have now been reduced to writing as regards war on land but which still apply in their customary form to warfare by sea (*f*). With respect to the written element, this comprises the following international Acts and Conventions: —(1) The Declaration of Paris, 1856, which, although mainly concerned with the relations between belligerents and neutrals (*g*), yet affects also the relations of the belligerents themselves, in so far as it deals with the subject of privateering (*h*). (2) The Hague Convention "relative to the status of enemy merchant ships at the outbreak of hostilities," No. 6 of 1907, which exempts from capture, under certain conditions, enemy vessels in or on their way to the ports of a belligerent on the outbreak of war (*i*). (3) The Hague Convention "relative to the conversion of merchant ships into warships," No. 7 of 1907 (*k*). (4) The Hague Convention "relative to the laying of automatic submarine contact mines," No. 8 of 1907 (*l*). (5) The Hague Convention "respecting bombardment by naval forces in time of war," No. 9 of 1907 (*m*). (6) The Hague Convention "for the adaptation of the principles of the Geneva Convention to maritime war," No. 10 of 1907 (*n*), with which we may group a minor

(*d*) *Supra*, p. 94.

(*e*) So far as they apply at all: see p. 94, nn. (*q*), (*r*), (*s*), *supra*.

(*f*) The conventional rules which now govern the treatment of prisoners of war, although not strictly applicable to those captured on the sea, at any rate until they are landed, would probably be observed throughout, in so far as the situation admitted.

(*g*) In so far as it deals with liability and the immunity of neutral goods in enemy ships and of enemy goods in neutral ships.

(*h*) This Declaration has now been accepted by all maritime Powers of any importance, with the exception of the United States, which in the Civil war of 1861 and in the Spanish American war of 1898 confined itself to its principles: see p. 393, *infra*.

(*i*) This has been signed by all the Powers represented at the Conference, with the exception of the United States, China, and Nicaragua, although by Germany and Russia under certain reservations, and has now been ratified by Great Britain: see Table, App. xiv.

(*k*) This has been signed by all the Powers represented, with the exception of the United States, China, and three minor Powers; and has now been ratified by Great Britain: see Table, App. xiv.

(*l*) This has been signed, although in some cases with reservations, by all the Powers represented, with the exception of Russia, Spain, Portugal, Sweden, China, and two minor Powers, and has now been ratified, although with reservations, by Great Britain: see Table, App. xiv.

(*m*) This has also been signed by all the Powers represented with the exception of China, Spain, and Nicaragua, although in some cases with reservations; and has now been ratified by Great Britain: see Table, App. xiv.

(*n*) This has been signed by all the Powers represented, with the exception of Nicaragua; but by Great Britain under reservation of Arts. 6 and 21, and subject also to a reservation with respect to the inte-

Convention "relating to hospital ships," concluded at the Hague in 1904, exempting hospital ships in time of war from certain port charges (*o*). (7) The Hague Convention "relative to certain restrictions on the exercise of the right of capture in maritime war," No. 11 of 1907 (*p*). There are also other Conventions, such as that "relative to the establishment of an International Prize Court," No. 12 of 1907, and that "respecting neutral rights and duties in maritime war," No. 13 of 1907, which, although concerned for the most part with the relations of belligerents and neutrals, yet touch either at certain points or indirectly on the relations between the belligerents themselves. The rules embodied in these Conventions constitute a body of written law which may now be taken to be authoritative, except perhaps as against a few Powers that have either refused to adopt them or have adopted them under reservation of particular provisions (*q*). (ii) As regards the "unwritten element," there remain, despite these Conventions, a large number of topics—some of them of the first importance, such as the question of enemy character for the purposes of maritime capture, and the question of the place at which merchant ships may be converted into warships—which are still left to the operation of the customary law. Indeed, prior to 1907, it may be said that, save for the Declaration of Paris, the relations between belligerents and neutrals as regards the conduct of war by sea were governed almost wholly by custom (*r*); although it was precisely in matters belonging to this branch of law (*s*) that the practice of States was most divergent. This, however, has, as we shall see hereafter, now been rectified in some measure by the Declaration of London, 1909 (*t*), in so far as that may avail.

Bombardment by Naval Forces: Contributions, Requisitions, and Pillage.

Under the customary law, there was much divergence of opinion as to whether a belligerent, in naval war, might bombard undefended sea-towns, or exact contributions and requisitions under threat of bombardment. Juristic opinion in general inclined to the view that bombardment in such cases could only be lawfully resorted to for the purpose of destroying material likely to be of use in war, or for the

pretation of Art. 12, and not so far ratified: by China under reservation of Art. 21; and by Turkey and Persia under reservation of a right to use the Red Crescent, and the Lion and Red Sun, respectively, in lieu of the Red Cross: see Table, App. xiv.

See p. 124, n. (*x*), *infra*.

(7) This Convention has been signed by all the Powers represented at the Conference with the exception of China, Montenegro, Nicaragua, and Russia; and has now been ratified by Great Britain: see Table, App. xiv.

(*p*) *Ibid.*

(*q*) Although often declared or modified by particular treaties.

(*r*) Such as blockade, contraband, the doctrine of the continuous voyage, convoy, unneutral service, and the destruction of neutral prizes.

(*s*) *Ibid.*, p. 386-7.

purpose of enforcing requisitions in kind necessary for the hostile fleet; and that contributions could only be exacted after a place had been invested or occupied by a force actually landed (*a*). But naval opinion and practice were for the most part opposed to these limitations (*v*). It was in view of this divergence, and in pursuance of a wish to that effect recorded by the Conference of 1899, that the matter was brought up for consideration before the Hague Conference of 1907; with the result that an agreement on the subject was ultimately reached and embodied in the Convention "respecting bombardment by naval forces in time of war," No. 9 of 1907. In effect, this Convention prohibits generally the bombardment by naval forces of "undefended" ports, towns, villages, dwellings or buildings; and also provides that a place shall not be treated as "defended" solely because automatic submarine contact mines are anchored off the harbour (*x*). Nevertheless, even in the case of undefended places, bombardment may be resorted to for the purpose of destroying military works, military or naval establishments, war material, workshops or plant capable of hostile use, or ships of war in harbour if the local authorities after due notice fail to destroy them; whilst if required by military necessity such a bombardment may even be resorted to without notice; although in either case the rest of the town must be spared so far as possible (*z*). The bombardment of undefended places is also allowed if, after formal demand, the local authorities fail to comply with requisitions for provisions or supplies needed for immediate use by the naval force before the place. Such requisitions must be in proportion to the resources of the place; they can only be made in the name of the commander of the force; and they must be paid for so far as possible in cash, or failing this, their receipt must be acknowledged (*a*). But the bombardment of undefended places for the non-payment of money contributions is altogether forbidden (*b*). In all bombardments by naval forces, moreover, steps must be taken to spare as far as possible buildings devoted to public worship, art, science or charitable purposes, historic monuments, hospitals and places where the sick or wounded are collected, so long as they are not being used at the time for military purposes; such places being indicated by a distinctive mark as prescribed by the Convention (*c*). Unless military exigencies render it impossible, notice of an impending bombardment must also

(*v*) See the rules formulated in 1896 by the Institute of International Law; Hall, 430, n. 2.

(*x*) So far at least as evidenced by naval manœuvres in peace; but see *contra* the U. S. Naval War Code of 1900, which adopts in the main the rules formulated by the Institute. On the subject generally see Oppenheim, ii. 264 *et seq.*

(*x*) See Art. 1. This was, however, objected to on the ground that such mines are really more formidable than guns and also more dangerous to navigation; and has, therefore, not been accepted by Great Britain, France, Germany, and Japan.

(*z*) Art. 2. See App. vii. *i*, *ii*, *iii*.

(*a*) Art. 3.

(*b*) Art. 4.

(*c*) Art. 5.

be given to the inhabitants (*d*); whilst the giving over of a place to pillage even when taken by assault is in any case forbidden (*e*).

Ruses—Deceit—False Flags.

The employment of ruses and other methods for deceiving the enemy is allowed to the same extent, and subject to similar limitations, as in land warfare (*f*). This excludes all forms of treachery: all false statements in matters where the word of a commander is intended to be acted on without enquiry; and also the use of signs and emblems to which a particular meaning attaches for any other purpose than that for which they stand. The use of a false flag is permissible, although occasionally forbidden by municipal regulation; but in any case it is subject to the condition that a vessel must show her true flag before proceeding to attack (*g*).

The Use of Submarine Mines and Torpedoes.

The different kinds of mines now used in naval war are:—(1) Mines laid or anchored at sea, but fired by an electric current controlled from the shore; (2) Mines anchored at sea, which explode automatically on coming into contact with a passing vessel; and (3) Floating mines, which similarly explode by contact but are not anchored. Of these kinds of mines, the first, being under control, present no danger to peaceful shipping; but the second are not only a source of danger *in situ*, but are apt to break loose and to assume the character of unanchored contact mines; whilst the last are the most dangerous of all, inasmuch as, being at the mercy of wind and tide, they may be carried anywhere and bring disaster at any time on innocent vessels. The serious danger to neutral shipping following on the use of both the latter kinds of submarine mines was grimly attested by the experiences of the Russo-Japanese war of 1904 (*h*). At the Hague Conference of 1907, an attempt was therefore made to impose, by common agreement, certain restrictions upon the use of such instruments by belligerents. In the result, and after prolonged discussion, an agreement, although only of a provisional character (*i*), was reached, which is now embodied in the Convention "relative to the laying of automatic submarine contact mines," No. 8 of 1907. By this Convention it is forbidden to lay

(*d*) Art. 6.

Art. 7. On the subject generally, see Westlake, ii. 315 *et seq.*; Pearce Higgins, 352 *et seq.*

(*e*) *Supra*, p. 98.

(*f*) See Oppenheim, ii. 262; Hallock, i. 567, 569; and as to the British practice, Manual of Naval Prize Law, 62.

(*g*) At the Hague Conference it was stated by the Chinese delegate that a vast number of coasting vessels, fishing boats and the like, had been lost owing to these mines, and that from five to six hundred persons engaged in peaceful pursuits had so perished: see Pearce Higgins, 329; Barclay, Problems, 59 *et seq.*

(*h*) See Preamble to Convention "until such time as it may be possible to formulate rules which shall ensure to the interests involved all the guarantees desirable."

unanchored contact mines unless so constructed as to become harmless within one hour after control over them has ceased; to lay anchored contact mines that do not become harmless on getting loose; and, finally, to use torpedoes that do not become harmless after missing their mark (*k*). It is also forbidden to lay contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial navigation (*l*). When anchored contact mines are used every possible precaution must be taken for the security of peaceful navigation. Belligerents are required to do their utmost to render such mines harmless within a limited time; and, if they should cease to be under observation, to notify the danger zones, as soon as military exigencies permit, alike to mariners and to States (*m*). Neutral Powers which lay contact mines off their coast are subject to the same conditions; whilst in this case notice must be given in advance (*n*). At the close of the war all such mines are required to be removed in so far as possible, each Power removing its own mines; whilst where contact mines have been laid by one belligerent off the coast of the other their position must be notified by the former to the latter (*o*). Nevertheless, Powers not as yet possessing perfected mines of the description contemplated by the Convention, are exempted from these provisions, and are merely required to convert the *matériel* of their mines as soon as possible, so as to bring it into conformity with the above-mentioned requirements (*p*). The Convention is to remain in force for seven years (*q*), and thereafter unless denounced in the manner prescribed (*r*). The question of the employment of contact mines is to be reopened between the contracting Powers six months before the close of the period first named, unless the matter shall have been previously dealt with by the third Peace Conference (*s*). Great Britain has, however, only ratified the Convention under reserve of a declaration that the fact of its not prohibiting particular proceedings must not be taken to debar her from contesting their legitimacy (*t*). This Convention is altogether unsatisfactory; both as inadequately safeguarding neutral interests, and as thereby and in the event of disaster increasing the risks of war. Even such restrictions as it does impose are greatly weakened by the saving clause in favour of Powers not possessing the necessary equipment (*u*). Anchored contact mines may still be laid by a belligerent on his own waters for self-defence, or in the waters of the enemy for attack, or even on the high seas, to the great endangerment of neutral shipping. And although it is forbidden to lay these within the waters of an enemy "with the sole object of intercepting com-

(*k*) Art. 1.
Art. 2.
(*m*) Art. 3.
(*n*) Art. 4.
(*o*) Art. 5.
(*p*) No limit of time being specified: Art. 6.
(*q*) From the sixtieth day after the first deposit of ratifications.
(*r*) Art. 11.
(*s*) Art. 12. As to signatories and ratification, see Table, App. xiv.
(*t*) *Ibid.*
(*u*) See n. (*n*).

mercial navigation," it will always be open to a belligerent to allege a military object, which it will be difficult or impossible to disprove (*xx*). The requirement that where mines cease to be under observation the danger zones must be notified is also rendered illusory by the qualification "as soon as military exigencies permit." The British declaration, moreover, serves largely to relegate the question of the legality of the use of mines to the domain of the customary law. Here we have nothing to guide us except general principle and analogy. The use of floating contact mines anywhere except perhaps during an engagement and on strict condition of their becoming harmless within a limited time—would appear to be wholly indefensible (*yy*). The use of anchored mines on the high sea would appear to constitute an infringement of the principle of the freedom of the sea and the general right to security of navigation. It is true that belligerents are entitled to carry on their operations on the high sea, and that neutrals must accept all consequent risks whilst such operations are proceeding; but this involves only a transitory danger, which is generally apparent and avoidable (*yyy*). Finally, the use of anchored contact mines, even in belligerent waters—although commonly approved—would appear—save for the purposes of defence and on condition of efficient notice of exclusion—to be an infringement of the right of innocent passage or access (*yyyy*). Neither belligerent right nor belligerent need can justify the destruction of neutral vessels and crews engaged in lawful traffic; whilst, even as to those engaged in unlawful traffic, belligerent right cannot extend to the substitution of instant destruction for the ordinary penalty of capture and condemnation after or subject to judicial decree (*z*).

The Application of the Principles of the Geneva Convention to Naval War.

The treatment of the wounded, sick, or shipwrecked, in naval war, is now regulated by the Convention "for the adaptation of the principles of the Geneva Convention to maritime war," No. 10 of 1907, which revises the corresponding Convention of 1899, in the light of the changes effected by the Geneva Convention of 1906 relative to land war, and replaces it as between the signatories (*a*). Its

(*x*) This Art. also appears to countenance the use of mines in cases of "strategic" although not "commercial" blockade: *Infra*, p. 405.

(*xx*) On the analogy of the poisoning of wells. Their complete prohibition found much support at the Conference, and formed part of the British and U. S. proposals: Pearce Higgins, 329, 332.

(*y*) Barclay, Problems, 60.

(*yy*) *Infra*, 61.

(*z*) On the subject generally, see Westlake, ii. 322–326; Pearce Higgins, 328 *et seq.*; Regulations adopted by Institute of International Law, 1913, *Ann.* 344.

(*a*) See Art. 25. As to signatures, ratifications, and reservations, see Table, App. xiv., *infra*. Turkey and Persia sign under reservation of a right to use the Red Crescent and Lion and Red Sun, respectively, in lieu of the Red Cross; and Great

more important provisions may be conveniently grouped as follows: (1) All sailors, soldiers, and others officially attached to fleets or armies are when sick or wounded to be respected and cared for by the captors (*b*); whilst after an engagement a belligerent is required to fulfil the same duties as in war on land (*c*). Subject to this, wounded, sick, and shipwrecked persons who may be captured become prisoners of war; and the surrender of those found on board hospital ships belonging to the other belligerent may also be demanded (*d*). Thereafter they may either be detained as prisoners of war, or sent to a neutral country, or even to their own country on condition of not serving again during the war (*e*). If left at a neutral port with the consent of the authorities they must be interned and tended by the neutral Government, although at the cost of their own State (*f*). (2) With respect to hospital ships—three kinds of vessels are recognized—(a) military hospital ships, these being vessels fitted out for that purpose by the belligerent States; (b) private hospital ships, these being vessels fitted out by private individuals or officially recognized relief societies belonging to either belligerent; and (c) neutral hospital ships, these being vessels that have been fitted out by private individuals or officially recognized societies belonging to neutral countries, but placed under the control of one belligerent with the assent of their own Government (*g*). Subject to certain conditions prescribed by the Convention—which include a notification of their intended use to the other belligerent, their non-use for military purposes, the use of a colour designation varying with the kind of vessel, and the use of the prescribed flags (*h*)—all such vessels are exempt from capture and attack; and are, even when the property of the State, free from the restrictions attaching to public belligerent vessels in neutral ports. On the other hand, they are required to afford relief without distinction of nationality; they must not be used for military purposes under pain of forfeiting their privileges; they must not hamper either of the combatants; and they are also subject to search and inspection by, and to the orders and control of, the opposing belligerent, and may in case of grave need even be detained (*i*). (3) With respect to the sick and wounded on board enemy warships—when an engagement occurs all the sick wards are to be respected and spared as far as possible, so long as they are used for hostile purposes. But when a vessel has been captured, its hospital accommodation and equipment may be appro-

British [illegible] under reserve of Arts. 6 and 21; Arts. 3, 7, 8, the future use of this exemption has been forbidden, with [illegible] in favour of existing rights for [illegible] years, by 1 & 2 Geo. V., c. [illegible].

(*b*) Art. 11.

(*c*) Arts. 15, 17, and 18, [illegible].

(*d*) Art. 12.

(*e*) Art. 14.

(*f*) Art. 15.

(*g*) Arts. 1—3, 5.

(*h*) All hospital ships are to be painted white; military hospital ships having also a horizontal band of green, and non-military a similar band of red; whilst all must fly the Geneva flag, together with their national flag, or if neutral, then also the flag of the belligerent under whose control they act; see Arts. 3, 5.

(*i*) Arts. 4, 8.

priated by the captor, but must not be diverted to other uses, save in case of military necessity, and even then only after due provision has been made for the sick and wounded found therein (*k*). The members of the religious, medical, or hospital staff of a captured ship are inviolable and cannot be made prisoners of war. They may be required to continue the discharge of their duties so long as may be necessary, receiving in that case the same pay as if they belonged to the captor's forces; but thereafter they must be allowed to leave, taking with them such articles and instruments as belong to them (*l*). (4) With respect to the right of neutrals to render fortuitous aid to wounded, sick, or shipwrecked combatants—belligerents may appeal to neutral merchant vessels, yachts, or boats to receive the sick and wounded; and such vessels as comply, as well as others who receive them, shall enjoy special protection and may be granted certain immunities. In no case, moreover, is a neutral vessel to incur any liability by reason merely of having such persons on board (*m*). At the same time, the right of a belligerent warship to require the surrender of sick and wounded belonging to the enemy is expressly extended to those found on board neutral vessels, other than public vessels (*n*). Great Britain, however, signed the Convention under reservation of a declaration that this article is to be understood as applying "only to the case of combatants rescued during or after a naval engagement in which they have taken part" (*o*). When wounded, sick, or shipwrecked persons are received on board a neutral war ship, although their surrender cannot be demanded, every precaution must be used to prevent such persons from taking any further part in the operations of war (*p*). In the case of combined naval and military operations the Convention applies only to forces on shipboard (*q*). The signatories undertake to issue instructions to their naval forces in conformity with these provisions (*r*), and to prevent the unauthorized use of the distinctive marks prescribed for vessels (*s*). By a Convention "re-

(*k*) Arts. 7, 8.

(*l*) Arts. 10, 11.

(*m*) Arts. 9, 12.

(*n*) Art. 12.

(*o*) Parl. Papers, Misc. No. 6 (1908), p. 148; Pearce Higgins, 389. The British Government doubted whether under the existing law such a demand could be made even of a neutral private vessel; but although there is no settled usage on the subject, the rule embodied in the Convention is correct in principle, at any rate so far as relates to enemy persons rescued after an engagement; see Westlake, ii. 278. By the Second Peace Conference (Conventions) Bill, s. 4, it was proposed to authorize and require the delivery up by a British vessel of such persons, "being combatants, who have been rescued after a naval engagement in which they have taken part." The contention put forward, that the mere reception by a neutral vessel of the enemy sick or wounded would, apart from Convention, render the vessel liable to condemnation for unneutral service, appears to be unwarrantable.

(*p*) Art. 13; and p. 276, *ante*.

(*q*) Art. 22.

(*r*) Art. 20.

(*s*) See Art. 21. Although Great Britain signed under reservation of this Article, yet by the Second Peace Conference (Conventions) Bill, s. 3, it was proposed to prohibit the painting of vessels to resemble hospital ships and the use of the Geneva flag.

lating to hospital ships" made in 1904, all hospital ships complying with the prescribed conditions (*b*) are exempted in time of war, and in the ports of the contracting parties, from all dues and taxes levied on ships for the benefit of the State (*a*).

NAVAL FORCES: QUALIFIED CRUISERS — CONVERSION OF MERCHANT VESSELS.

CONTROVERSY BETWEEN GREAT BRITAIN AND RUSSIA WITH RESPECT TO THE PROCEEDINGS OF THE "PETERBURG" AND THE "SMOLENSK."

[1904: Parliamentary Debates, 4th ser., vol. 138, 1433, 1479; Smith and Sibley, 40 *Int. Law*; 77 *The Times*, July, September, 1904.]

Circumstances leading to Controversy. In July, 1904, during the Russo-Japanese war, the "Peterburg" and the "Smolensk," two vessels belonging to the Russian Volunteer Fleet, passed from the Black Sea through the Bosphorus and Dardanelles into the Mediterranean, and thence through the Suez Canal into the Red Sea. Both vessels carried the mercantile flag, and declared themselves as merchant vessels, alike on passing through the Straits and through the Canal. The ships of the Volunteer Fleet belong to a patriotic association (*a*), which is supported mainly by public subscriptions, but which receives also a subsidy from the Government on certain conditions, and which has for its object the providing of an auxiliary fleet for naval service in time of war. In time of peace these vessels carry the mercantile flag, and are at liberty to engage in mercantile traffic, although for the most part employed in public service (*b*); but the captain and one officer

(*a*) Originally these articles formed Convention of 1899, but now, by modification, those of the correspondent Convention of 1907.

(*b*) This Convention has now been adopted by twenty-two States; but Great Britain, although formally disposed, was not a party to the Conference which framed it, and decided to not Convention, owing to the fact that special legislation would be required to give effect to its provisions; see Pearce Higgins, 202 [illegible].

(*a*) Originally formed in 1877, when war with Great Britain appeared to be imminent.

(*b*) As to the transport of materials, soldiers, and goods between the Black Sea ports and the Russian possessions in the Far East.

of each vessel are commissioned by the State, whilst the crews are subject to naval training and under naval discipline. In time of war these vessels are at the disposal of the Government, and on entering the naval service assume the naval flag (*c*). By various treaties and conventions (*d*) the passage of the Straits is interdicted to vessels of war, and this prohibition has been declared to be part of the public law of Europe (*e*). By an agreement of 1891, made between Russia and Turkey, it was also stipulated that vessels belonging to the Volunteer Fleet, if allowed to pass the Straits, should not carry arms or munitions of war. On the occasion in question, both the "Peterburg" and the "Smolensk," although sailing under the mercantile flag, carried, in fact, both an armament, munitions of war, and crews sufficient to enable them to engage in hostilities. Soon after leaving Suez both vessels mounted their guns, hoisted the Russian naval ensign, and thereafter proceeded to exercise belligerent rights over neutral commerce. Amongst others the German steamship "Prinz Heinrich" was stopped in the Red Sea by the "Smolensk" and a number of her mail bags taken from her (*f*). On the 13th July the British steamship "Malacca" was seized by the "Peterburg" on the ground of carrying contraband: although the alleged contraband consisted, in fact, of arms and ammunition belonging to the British Government and destined for the dockyards at Hong Kong and Singapore. A prize crew was then put on board and the Russian naval flag hoisted—although the prize was still in law a British vessel—and the vessel herself sent to Port Said where her passengers and crew were disembarked. After this she proceeded under the charge of a prize master through the Canal; it being understood that she was to be taken to Libau for adjudication. The "Smolensk" also seized the British steamship "Ardova," bound from New York to Manila and Japan, having on board a quantity of gunpowder consigned by the United States War Department to the Philippines. This vessel was also sent to Suez with a prize crew on board and under

(*d*) See p. 130.

(*e*) The Convention of London, 1841; the Treaty of Paris and Straits Convention, 1856; and the Treaty of London, 1871.

(*c*) See vol. i. 149.

(*f*) These were afterwards put on board the British S.S. "Persia" and thus forwarded to their destination.

the Russian naval flag; although she was soon afterwards released. Other British vessels were subjected to similar treatment.

Controversy and Settlement. When these facts became known the British Government addressed a protest to the Russian Government, challenging the legality of these proceedings. The British contention was, in effect, that no "ship of war" could issue from the Black Sea; that if vessels belonging to the Volunteer Fleet issued therefrom it necessarily followed that after passing the Straits as merely mercantile vessels they had no right afterwards to assume the character of cruisers or to interfere with neutral commerce; whilst if they claimed belligerent rights as ships of war then they had no right under European public law to issue from the Black Sea or to pass the Straits; and hence that in either case such vessels were in the position of "unqualified cruisers," with the result that all captures made by them were invalid (*g*). It was further pointed out that the ammunition seized on board the "Malacca" was the property of the British Government and intended for the British-China Squadron, and was contained in cases clearly marked with the Government mark. In the result a compromise was arrived at, under which it was agreed that the "Malacca" should be taken to Algiers and there released after a formal examination, and an assurance from the British Consul that the cargo alleged to be contraband was the property of the British Government and that the rest of the cargo was also innocent. These formalities were gone through on the 27th July; and on the 28th the "Malacca" was restored to her owners, and thereafter allowed to proceed on her original voyage. It was further agreed that the "Peterburg" and the "Smolensk" should no longer act as cruisers, and that any vessels captured by them should be released. The Russian Government, however, avoided any admission of the general principle that vessels of the Volunteer Fleet that had passed through the Straits as "private vessels" were legally disqualified from acting as "ships of war." It attempted, in fact, to cover its retreat from an untenable position by alleging that the "Peterburg" and the "Smolensk" had re-

(*g*) See the statements made by Lord Lansdowne in the House of Lords, and Mr. Balfour in the House of Commons, on the 28th July.

regular
ceived special commissions the term of which had already ex[pired] them and, as regards the "Malacca," that in view of the official sta[te]ment of the British Government a special inspection had been arranged in consequence of which the vessel had been released (*h*). Some delay occurred in communicating this decision to the commanders of the vessels concerned, and it was not until the 6th September that the official revocation of their commissions was delivered to the "Smolensk" and "Peterburg" off the coast of Zanzibar by H.M.S. "Forte." Moreover, although British commerce was not afterwards interfered with by them it appears that both the "Peterburg" and the "Smolensk" were subsequently recommissioned, although under other names, and in this character accompanied the Russian fleet on its final voyage to the East.

The main issue in this controversy was whether the *Peterburg* and *Smolensk* were qualified to act as belligerent cruisers. As to this, it seems that they would have satisfied the existing requirements but for two facts, one of which was that these vessels had assumed the character of warships on the high seas—although the law on this point still remains unsettled (*i*)—whilst the other was that these vessels had both passed the Straits connecting the Black Sea and the Mediterranean as merchant vessels. These Straits occupy, as we have seen, a special position and are subject to special regulations forming part of the public law of Europe, by virtue of which their passage, save in certain exceptional cases not material to the present issue, is interdicted to ships of war (*j*). To allow vessels to pass them under the merchant flag, and then to assume the character and belligerent rights of warships, would have been, in effect, to nullify these international engagements (*k*).

General Notes. *Qualified Belligerents in Maritime War.*—In sea warfare it is the vessel rather than the individual that constitutes the qualifying unit; and, in view of the extensive rights of interference with neutral commerce which the conduct of war by sea confers on either belligerent, the question of qualification is one of considerable importance to neutrals. In general, and subject to the explanations furnished hereafter, it may be said that the quality of lawful belligerents, with the consequent right to carry on hos-

(*h*) See *The Times*, 3rd Aug. 1904. *Letter*, p. 131-2.
(*i*) See vol. i. 149.
(*j*) *Ibid.* 324.

and to exercise other belligerent powers, will attach to all the Pels owned and commissioned for that purpose by either of the belligerent States at war and forming part of its regular naval forces; and further to all vessels which, even though not owned by the State, are publicly commissioned by it and incorporated into its service, in such a way as to bring them under its immediate and exclusive control and to render it avowedly responsible for their action (*b*). Vessels which do not comply with this condition are not strictly qualified belligerents and are not therefore entitled to exercise belligerent powers; although, like other private vessels, they may engage in hostilities in self-defence and may capture an assailant if they can (*c*).

Permanent and Subsidiary Naval Forces. In point of fact although the fact is not yet sufficiently taken account of in legal theory the naval forces of nearly every State comprise two classes of vessels: (1) fighting vessels (*vaisseaux de combat*), such as battleships, cruisers, torpedo boats, destroyers, and submarines; and (2) auxiliary vessels (*vaisseaux auxiliaires*), such as transports, colliers, repairing ships and despatch boats (*d*). Both classes rank as public vessels, and are in war subject to such disabilities as attach to vessels having the public character (*e*). The former are also entitled in time of war to take belligerent action and to exercise belligerent powers of any lawful kind, whilst even the latter may exercise these powers if duly commissioned for that purpose, although their equipment and usual employment ordinarily preclude this. It will also be open to a State, either before or during the war, to acquire vessels from private owners and to include these in its regular naval forces, employing them as fighting or auxiliary vessels, according to their character; although such a proceeding ought to be officially announced, whilst, in strictness, it would seem that the commission can only be issued within the national territory or territory under national control (*f*). Over and above this, it will be open to either belligerent to enlist in his service, temporarily, volunteer and other vessels, and to confer on them a belligerent character so long as certain conditions, described hereafter (*g*), are complied with.

Privateers. Privateers were vessels belonging to private owners which, in time of war, were furnished with a commission from the State (the so-called letters of marque (*h*)), empowering them to carry on war against the enemy, and to capture enemy vessels and property

(*a*) [illegible] p. 131.
[illegible] Higgins, 316 (*c*).
(*b*) As regards this [illegible] p. 369.
[illegible] 172.
(*c*) [illegible] 72 and p. 151.
(*d*) See p. 129.
(*e*) See vol. i. 336.

tion was proposed by Lord Reay at the Hague Conference, but the proposal was subsequently withdrawn.

The employment of such vessels preceded the formation of regular navies, but continued long afterwards; the distinction between them and the regular naval forces becoming, however, more marked as naval organization progressed. The system of privateering had, indeed, some advantages; the chief of these being that it afforded a ready and effective weapon of offence to States not possessing a large navy. Such vessels were, moreover, subject to various restrictions (*s*); whilst the issue of letters of marque to neutrals was sometimes forbidden either by treaty or by municipal law (*t*). Nevertheless, the system was at bottom a vicious one; as involving the carrying on of war at private cost and for private gain, by agents who were unamenable to proper control—to the great disadvantage of neutral trade (*u*). At any rate, the practice came to be generally reprobated; and, in 1854, on the outbreak of the Crimean war, both Great Britain and France announced their intention of not issuing letters of marque to private owners. On the termination of that war, the Declaration of Paris, 1856, amongst other things, declared that "privateering is and remains abolished" (*x*). This Declaration, although originally made only between the parties to the Treaty of Paris, was subsequently adopted by nearly all maritime States, with the exception of the United States (*y*), Spain and Mexico. The United States, moreover, in the civil war of 1861, and both the United States and Spain (*z*) in the war of 1898, conformed to its principles; whilst both Spain and Mexico have now formally accepted it. Nor is the practice, in its former character, likely to be revived (*a*).

The Enlistment of Privately Owned Vessels. Although privateering was declared to be abolished by the Declaration of Paris and was indeed in its original form generally abandoned, States, in their desire to add to naval resources, soon began to revert to the practice of enlisting in their service vessels belonging to private owners. So, in 1870, on the outbreak of the Franco-German war, Prussia issued an invitation to private owners to fit out vessels for the purpose of attacking French warships (*b*), on the terms that the

(*s*) So, under the British practice, bonds conditioned on good behaviour were exacted from their owners; the vessels themselves were made liable to inspection and control of public vessels; and they were required to bring in all prizes for adjudication.

(*t*) See vol. i. 287; and Wharton, iii. 495.

(*u*) For a summary of the merits and defects of the system, see Woolsey, Int. Law, ss. 127, 128.

(*x*) Art. 1.

(*y*) The United States refused to accede to it, except on condition of the abandonment of the right of capturing private property other than contraband: see Moore, Digest, § 1221.

(*z*) Even though the latter reserved the right to issue letters of marque.

(*a*) On the subject generally, see Taylor, 438 *et seq.*; and Westlake, ii. 154.

(*b*) This limitation was consequent on the proposal originally made by Germany that private property should be exempt from capture, although on the failure of France to respond this proposal was withdrawn.

officers and crews should be provided by the owners, but should be temporarily incorporated in the navy and under naval discipline; that the vessels themselves should fly the naval flag; and that the owners should receive compensation for the use of their vessels and an indemnity in the event of their capture or destruction, as well as large premiums for the destruction of enemy vessels. France protested against this as an infraction of the Declaration of Paris, and appealed to the British Government; but the latter was advised by its Law Officers that there was a substantial distinction between the German proposals and the system abolished by the Declaration of Paris, and for this reason declined to take any action in the matter. That there was a substantial distinction of object in the scheme as originally proposed cannot be denied; but if the essential features of privateering are the employment of private vessels manned by private crews to attack and capture enemy vessels at their own risk and expense and for private gain, it seems doubtful whether the mere tricking out of a private vessel with the public flag, and a declaration that the crews are to be deemed incorporated in the navy and subject to naval discipline, together with the substitution of premiums for prize money, constitute any real distinction. The Russian Volunteer Fleet, on the other hand, was, as we have seen, formed under the auspices of a patriotic association and was intended primarily to supplement the national forces; whilst its vessels had even in time of peace in some sort a public character, as being under the command of regular naval officers and their crews subject to naval training and discipline—in view of which it would seem that these vessels on being duly commissioned (*c*) were entitled to be regarded as qualified cruisers. More recently a new method of recruiting the regular navy came into vogue amongst maritime Powers; the practice being to grant subsidies to the great navigation companies, in return for which fast vessels, constructed generally on plans previously approved by the Government, were placed at its disposal for service either as cruisers or transports in time of war (*d*). Such arrangements are perfectly legitimate; and even under the customary law and despite its incertitude in detail such vessels would be entitled by way to the character of qualified belligerents, provided they were taken over and commissioned by the State, and their operations conducted, in fact as well as in name, under its direct control and on its responsibility. During the Spanish-American war, in 1898, Spain

(*c*) Although it is still a question whether the commission must not be issued within the State territory.

(*d*) Such arrangements, although they vary greatly in detail, have been made by France, Germany, Italy, and the United States. The British [illegible] subsidy, to take over certain vessels for naval use in time of war, such vessels being ordinarily employed in part by sailors belonging to the naval reserve; whilst a large number of other vessels were held at its disposal without subsidy; but these arrangements have since been relinquished, with the exception of that made with the Cunard Co.

announced the formation of a service of auxiliary cruisers "under naval law," which, alone, would not have sufficed to confer on the vesels in question the character of lawful belligerents. The United States organized and used a similar service; but in this case the vessels were taken over by the Government, manned in part by naval officers and men, and placed under the entire control of the senior naval officer (*e*). Somewhat different is the case where a belligerent State hires vessels belonging to private owners for merely temporary service as transports, colliers or otherwise. Here the question of belligerent character will not generally arise; although such vessels, whether belonging to subjects or neutrals, will possess an enemy character as regards the other belligerent, and will on that ground be liable to capture or destruction (*f*).

The Hague Convention relative to the Conversion of Merchant Ships into Warships.—But although the legality of the enlistment of private vessels and their conversion into ships of war was recognized, there was, so far, no authoritative or uniform rule as to the precise conditions that were required. The matter came under consideration at the Hague Conference of 1907, with the result that the present Convention, No. 7 of 1907, "relative to the conversion of merchant ships into warships" was adopted. By this Convention it is provided in effect (1) that no vessel can acquire the status of a ship of war or the rights and duties appertaining to that character unless she is placed under the direct authority and immediate control and responsibility of the Power whose flag she flies (*g*); (2) that such a vessel must carry all the external marks that distinguish warships belonging to her nationality (*h*); (3) that the commander must be in the service of the State, duly commissioned, and his name notified on the official navy list (*i*); (4) that the crew must be subject to naval discipline (*k*); (5) that the vessel must comply with the laws and customs of war (*l*); and, finally, (6) that the conversion must be publicly notified as soon as possible (*m*). This Convention, so far as it goes, has the merit of replacing the somewhat vague and uncertain rules of the customary law on this subject, by rules that are definite and authoritative. At the same time it leaves some important problems unsolved. It makes, for instance, no provision as to the place of conversion; this being a question on which it was found impossible, either at the Hague Conference or at the Naval Conference of 1908-9 (*n*), to arrive at any agreement. On prin-

(*e*) See Moore, Digest, vii. 512; the *Berlin*, 89 Fed. Rep. 763; Hershey, Problems, 204.

(*f*) *Infra*, p. 158.

(*g*) Art. 1.

(*h*) Art. 2.

(*i*) Art. 3.

(*k*) Art. 4.

(*l*) Art. 5.

(*m*) Art. 6. This Convention has been ratified by Great Britain, but not by the United States; see Table, App. xiv., *infra*.

(*n*) As to the general course of discussion on this subject and the various solutions offered, see Pearce Higgins, 317 *et seq.*

ciple it would seem that such a conversion, involving as it does the setting forth of an organized instrument of war (*o*), can only be lawfully made in territory belonging to or occupied by the commissioning State or an ally (*p*). To effect it in neutral territory would constitute at once an infringement of neutral sovereignty, and, if acquiesced in by the neutral, a violation of neutral duty (*q*). To effect it on the high seas would appear to infringe the right, alike of neutral Governments and of neutral traders, to know beforehand how they stand in the matter of belligerent interference with their trade (*r*) and through what agents and instruments such interference will be exercised—a condition insufficiently fulfilled by Art. 6, which merely provides that official notification shall be made "as soon as possible" (*s*). If, moreover, a vessel can be converted on the high seas, it would seem to follow, in default of express restriction (*t*), that she may equally be re-converted there; with the result that a vessel might change her character at will, claiming at one time the privileges of a warship, and at another time, and especially in the use of neutral ports, those of a private vessel. Hence conversion on the high seas, if taken in conjunction with the incidental right of re-conversion, would appear to be not only a cause of offence to neutrals but also an infringement of the rule of the *jus belli* which forbids intermittent belligerency (*u*) and to warrant all consequent penalties (*x*).

THE RIGHT OF MARITIME CAPTURE.

THE "THALIA."

(1905; Takahashi, International Law applied to the Russo-Japanese War, 608.

Case. In 1904, after the outbreak of the Russo-Japanese war, the steamship "Thalia," the property of a Russian company, was

(*o*) *Infra*, p. 343.

(*p*) Including either ports or territorial waters; see vol. i. 105.

(*q*) *Infra*, p. 298.

(*r*) *Infra*, p. 401.

(*s*) Which might occur long after the vessel in question had entered belligerent operations; see, by way of example, p. 127, *supra*. At the same time, the right of conversion on the high sea receives some support from a practice, sanctioned under the earlier customary law although no longer admissible under which a prize taken on the high seas might there be converted into a qualified cruiser, by placing her under the command of a commissioned officer of the captor vessel; see p. 358, *infra*, but also, *The Gran Para*, 1 Dods. 397.

(*t*) The Convention being silent on the subject.

(*u*) *Supra*, p. 97.

(*x*) *Ibid.* 114; and, on the subject generally, Pearce Higgins, 312 *et seq.*

seized as prize at Hakodate, in Japan, by an officer of a Japanese warship. At the time of her seizure the "Thalia" was undergoing repairs in a dockyard belonging to a private company, and had in fact been placed in dry dock on land. In the Court below the vessel was condemned on the ground that she did not lose her character as maritime property by being temporarily on land, and that as the maritime property of the enemy she was subject to capture. On appeal to the Higher Prize Court, it was contended, *inter alia*, (1) that the capture was not warranted by the Japanese "rules governing captures at sea," which made no provision for capture on land; (2) that by the Regulations annexed to the Hague Convention, No. 2 of 1899, to which Japan was a party, private property on land was not in general subject to seizure or confiscation (*a*), and that, even though provision was there made for the seizure of private property, including ships and vessels not subject to maritime law, for military purposes (*b*), yet this was not the purpose of the present seizure; (3) that the capture was also contrary to the general rules of international law, for the reason that the seizure was not made within those limits within which the law recognized a right of maritime capture; (4) that the claim to treat the vessel as "maritime property" was the less admissible in view of the fact that she was at the time incapable of navigation and lacking in all the essentials of maritime equipment; and (5) that the right of maritime capture, being an exception to the general rule and also opposed to modern tendencies, ought to be confined rigidly within the narrowest limits of admitted usage. In the result, however, the appeal was dismissed and the decree of condemnation confirmed.

Judgment. In the judgment of the Higher Court it was held that there was nothing in the Japanese "rules governing captures at sea" to negative the validity of the capture in question. The Hague Regulations had exclusive reference to war on land and were inapplicable to the present case. Nor was the capture opposed to the general rules of international law, for the reason that the placing of a vessel in dock or on land adjoining was only a means of restoring her efficiency as an instrument of navi-

(*a*) Arts. 23. 46. (*b*) Art. 53.

gation. Hence the vessel in question must be deemed to retain her character as "maritime property" of the enemy, as to which a right of capture was still recognized. Nor would her lack of sea-going capacity and of the necessary instruments of navigation at the time of capture, even if this had been established in fact, in any way affect this liability. It was also held that the fact of a vessel having been carried to the place of capture on board another vessel, as "cargo," did not confer any immunity (*c*).

This case decides that an enemy vessel, temporarily on land for the purpose of repairs, but retaining otherwise her general character as an instrument of navigation, remains subject to the right of maritime capture. Incidentally it was also ruled that this right was still to be regarded as a subsisting and normal institution of the law of nations. It is curious to notice that, in the case of the *Ekaterinoslav*, it was contended on behalf of the claimants that the right of maritime capture, as regards private property of the enemy that was neither contraband nor required for military purposes, was opposed to the more enlightened opinion on this subject, and that it behoved the Court in that case to give effect to those more advanced principles. In aid of this contention reference was made to the "rules as to maritime capture" adopted in 1882 by the Institute of International Law, which declared private property on sea to be inviolable, subject to a condition of reciprocity, except in cases of contraband or breach of blockade (*d*). This contention was, however, naturally rejected by the Court, on the grounds that the rule in question was so far only the expression of a pious wish, and that the right of maritime capture was in itself reasonable and warranted by current practice (*e*).

GENERAL NOTES. *The Capture of Private Property at Sea.* One of the main differences between land and sea warfare is that in sea warfare private property still remains liable to capture. And this applies both to enemy vessels, and to all sea-borne goods of the enemy that are not protected by the neutral flag. It formerly extended, according to the practice of one group of States, to enemy goods found on neutral ships; and, according to the practice followed by another group, to neutral goods found on enemy ships, unless protected by treaty; but such goods, not being contraband,

(*c*) See the *Leon XIII*, Takahashi Cases, 4, 5, 6, 8, 9, 10, 15, 23, and the *Benguela*, Takahashi Cases, 30.
(*d*) See the *Ekaterinoslav*, Takahashi Cases, 37.
(*e*) See the *Ekaterinoslav*, Takahashi Cases, 38.

are now exempted from capture both by the Declaration of Paris and by common usage (*g*).

The suggested Exemption of Private Property at Sea from Capture: (i) *Opinion and Practice.*—The right of capturing the private property of an enemy found on the sea is unquestionable under the existing law, and is universally admitted in practice except where qualified by treaty (*h*). At the same time the practice is regarded with a certain amount of disapproval, which has found expression not only in the writings of the jurists, but also in the official and international action of particular States. With respect to the former, the great mass of European opinion has hitherto been arrayed against the practice, although this is not now so nearly unanimous as formerly (*i*). The Institute of International Law has also on several occasions pronounced in favour of the inviolability of private property (*k*). English and American opinion on the subject is divided (*l*). With respect to official action, the Government of the United States as early as 1823 proposed the general adoption of the principle of the immunity of private property to Great Britain, France and Russia, although without success; whilst in 1856 it made the general recognition of this principle a condition precedent of its own acceptance of the rule for the abolition of privateering embodied in the Declaration of Paris (*m*). The same Government also adopted the principle of immunity in various treaties entered into with other States (*n*); although in default of treaty the right of capture would still be taken advantage of. The principle of exemption was reciprocally acted upon both by Austria and Prussia, and also by Austria and Italy, during the wars of 1866. It was proclaimed by Germany in 1870, but was subsequently withdrawn on the failure of France to respond (*o*). Italy, in 1865, incorporated it into her maritime code, subject to the condition of reciprocity. A proposal to declare private property on the sea exempt from capture save in cases of contraband or attempted violation of

(*g*) The right of capture also extends to neutral property, whether ships or goods, engaged in acts which a belligerent is entitled to restrain; but this, of course, rests on other grounds and will come under consideration hereafter.

(*h*) Hall, 441. It was also assumed as a necessary basis of discussion at the Naval Conference of 1908-9.

(*i*) See Oppenheim, ii. 223. Amongst European writers who are opposed to the practice are D. Martens, Bluntschli, Heffter, and Calvo.

(*k*) In 1875, it put forward the inviolability of private property under the enemy flag, and its immunity from capture, save in cases of contraband or attempted breach of blockade, as a desirable principle; and, in 1882, as a substantive part of its *Règlement international des prises maritimes*.

(*l*) Amongst English writers who are opposed to the practice are Mill, Maine, Hall, and Lawrence. On the subject generally, see Hall, 437; Westlake, ii. 130; Lawrence, 414; Wheaton (Dana), 451, n.; and Taylor, 561; and, for a short history of opinion and practice, Latifi, 118 *et seq.*

(*m*) Moore, Digest, vii. § 1198.

(*n*) As in 1785 and 1828 with Prussia, and in 1871 with Italy.

(*o*) Having probably been made only with a view to forcing the hand of the French Government.

blockade was submitted to the Hague Conference of 1899 by the United States, but the Conference did not consider the discussion of this question to be within its competence, although it put on record a wish that such proposal should be referred for consideration to a subsequent Conference (*p*). At the Hague Conference of 1907, accordingly, a similar proposal was brought forward by the United States delegates and led to an extended discussion (*q*); but no agreement was reached, although the wish was expressed that the adoption of regulations relative to naval war should form a part of the programme of the next Conference, and that in any case the Powers should apply as far as possible to war by sea the principles of the Convention relative to the laws and customs of war on land (*r*).

ii. *The question of its desirability, from an international standpoint.*—In view of the efforts that are being made to secure the exemption from capture of private property on the sea, it may be of advantage to glance briefly at the leading arguments which are adduced on either side, and this both from an international standpoint and from the standpoint of British policy. From the former standpoint, on behalf of the proposed immunity, it is urged: (1) That the present practice of subjecting private property to capture is an infraction of the principle that "war is a relation of State to State," which is here assumed to be a fundamental principle of the law of war (*s*). (2) That the present practice is, in any case, opposed to the humanitarian spirit of modern times, which seeks to exempt the individual so far as possible from the incidents of war (*t*). (3) That it is illogical and unjust that private property should be exempt from confiscation on land (*u*) and yet be subject to capture at sea. (4) That the practice of awarding the proceeds of prize to the captors, even though this is subject to the control of the Courts, imparts to war the taint of being still carried on for private gain, and ministers to private greed. (5) That the capture of private property on the sea is—in view both of the facilities now afforded by land traffic and the recognized immunity of enemy goods in neutral ships—largely ineffective as an instrument of war, and is therefore opposed to the true interests of the belligerents themselves, inasmuch as it tends to throw their carrying trade into the hands of neutrals (*x*). On the other hand, in favour of the retention of the existing practice, it is urged: (1) That private property is seized not as being the property of individuals but as part of the [illegible] of the State from which the latter derives largely

(*p*) See [illegible], No. 5, of the Final Act, 1899.

(*q*) As to the various other proposals then made, including one by Brazil, to exempt from the seizure of private property [illegible] seizure under the rules of [illegible] another [illegible] [illegible] [illegible] [illegible] [illegible] proposing to abolish prize money, see Pearce Higgins, 80 *et seq.*

(*r*) See *Law*, No. 4, of the Final Act, 1907; and Pearce Higgins, 78 *et seq.*

(*s*) *Supra*, p. 16.

(*t*) *Supra*, p. 92.

(*u*) H. R. 46.

(*x*) On this point see Lawrence, 415.

its resources for war, whether in money or ships or men; and that in this character its capture has proved in the past and is likely to prove in the future a most effective instrument of war (*y*), both by deranging the course of the enemy's trade, by interfering with his supplies, especially of foodstuffs and raw material (*z*), by restricting the disposal of his products, and by diminishing his resources in ships and men (*a*). (2) That the argument sought to be founded on the analogy of land war is altogether misleading, for the reason that private property on land is not only subject to the risks involved in military operations, but is also liable to seizure for military purposes in the form of contributions and requisitions (*b*). These incidents, it is said, are really far more oppressive to the individual than the seizure of property on the sea, which is rigidly controlled by the action of the courts, and greatly mitigated in effect by the practice of insurance; being at bottom probably the most humane of all the operations of war (*c*). (3) That in a maritime State, at any rate, the exemption of private property from capture would tend to set up a distinction between the military and the commercial classes, which would not only break in on the sense of national unity, but would, by relieving the latter class in a large measure from the pressure of war, also relax one of its existing deterrents. (4) That the proposed change, if it is to be a reality and not a pretence, would need to be accompanied by a simultaneous abolition of the right of commercial blockade (*d*); for the reason that, in a war in which commercial interests were largely involved, the temptation to strike at an enemy through his trade would induce a powerful belligerent who was debarred from capturing enemy property as such, to seek to attain the same object by a system of commercial blockades, which, if extensively resorted to, would probably prove more oppressive to commercial interests than the present practice (*e*). Nor, in this connection, is it possible to disregard that doctrine of military necessity, which Powers like Germany keep in reserve as a means of obviating the consequences of rules that stand in the way of military success (*f*), and which would warrant the seizure or destruction of enemy merchantmen whenever in the opinion of a commander military necessity might require this (*g*). With respect to the possible effect of the existing practice

(*y*) In the case, that is, of States having a considerable trade; in other cases, it would not be so effective, but to that extent the evils complained of would be correspondingly diminished.

(*z*) So far, that is, as the trade carried on in the national ships.

(*a*) See Wheaton, Dana, p. 401, n. 158. This conclusion is also borne out by the opinion of naval experts, such as Admiral Mahan.

(*b*) *Supra*, p. 110. It is not, as we have seen, altogether accurate to speak of private property on land as being "exempt," under the existing practice. All that has been done is to substitute organized and systematic seizure for chaotic seizure and plunder: see Barclay, Problems, 67.

(*c*) This aspect of the question is well stated by Dana: see n. (*a*), *supra*.

(*d*) *Ib. loc. cit.* p. 403.

(*e*) Because it would then affect all traffic, whether on neutral or on national ships.

(*f*) *Supra*, p. 95.

(*g*) See Westlake, ii. 132; P. S. Q. xx. 696, Dec. 1905.

in causing a transfer of the trade and shipping of either belligerent to neutrals, it might perhaps be urged that this, if true, should of itself operate as a deterrent to war, although it is doubtful in fact whether such a transfer would take place (*h*). At the same time it is admitted by many who otherwise favour the retention of the present practice, that it might be conveniently amended: as by abolishing the right to prize money, and, perhaps, also, by a more equitable apportionment of the losses sustained by private owners by means of a system of national insurance or national indemnity (*i*). At the Hague Conference of 1907, it was proposed, amongst other things, to substitute sequestration for capture the property or its sale price being returned to the owner on the conclusion of the war although this proposal was ultimately withdrawn (*k*). But whether so qualified or not the right of capturing private property at sea is scarcely likely to be discarded in the near future; although as time proceeds it may conceivably come to be regarded rather as an exceptional than a normal measure of war (*l*).

iii. *The policy and attitude of Great Britain on this question.* — It is sometimes assumed by foreign writers that Great Britain stands almost alone in her opposition to the proposed exemption of private property on the sea from capture. That this is far from being the case may be gathered from the fact that on the occasion of a vote being taken on this question at the Hague Conference of 1907 no less than eleven other States, including France, Russia, and Japan, voted against the proposed exemption (*m*). Still it cannot be denied that the attitude of Great Britain has so far been antagonistic; and also that the proposed exemption cannot well be carried into effect without her assent. The question then arises whether such an attitude is justified from the point of view of the national policy and welfare. On this question, again, there is much divergence of opinion. On the one hand it is said that, even if there were no moral reason for the change, it would be, at any rate, politic on the part of Great Britain to accept it by reason of (1) the dependence of the United Kingdom on foreign sources both for the food of its population and the material for its manufacturing industries; (2) the magnitude of the British sea-borne trade, and the danger of its transfer to

(*h*) It would be difficult to accomplish in the case of a trade of any magnitude without a large increase of neutral tonnage; whilst the transfer of such tonnage to the British flag would be a matter of some time. See Westlake, i. 131.

(*i*) For a discussion of the question of the abolition of prize money and the adoption of a system of national indemnity see that by the Earl of Selborne at the Hague Conference of 1907, and also in the United Kingdom in 1905 the Royal Commission on Supply of Food and Raw Material in Time of War also reported in favour of a system of national indemnity. See Report Parl. Papers, 1905. The arguments for and against this proposal with the conclusions of the Committee are summarized in Barclay, Problems, 292 et seq.

(*k*) See Higgins, 80, 81.

(*l*) See pp. 55, 62.

(*m*) Twenty-one States voted for and eleven against the exemption; one abstained from voting; whilst the representatives of eleven were not present.

neutrals if exposed to the risk of capture in time of war; and (3) the possible embarrassments to which a generally unfriendly neutrality, induced by a general disapproval of the practice upheld by Great Britain, would expose her in time of war. On the other hand, it is urged, and with even greater force, (1) that for Great Britain, as a non-military Power, to relinquish the present right would be to relinquish her chief and in some cases sole means of bringing pressure to bear on an enemy (*n*), and would inevitably diminish both her international consequence and her power to ward off aggression; (2) that even though the outbreak of war would tend to raise the price of food and raw material by enhancing the cost of carriage and the rates of insurance, yet so long as Great Britain maintained her naval superiority there would be no danger of a stoppage or even of a shortage of such supplies (*o*), whilst, without a strong navy, no formal declaration of the immunity of private property from capture would ensure her safety in this respect (*p*); (3) that any considerable transfer of her shipping and sea-borne trade to neutrals in time of war is, under existing conditions highly improbable (*q*); and (4) that in the event of war an unfriendly neutrality on the part of certain European Powers would in any case have to be faced, and this result, having its foundation really in other sources, would not be avoided or appreciably lessened by a surrender of the right of capturing private property (*r*). Hence it is thought that Great Britain is fully justified, not merely by reference to those general considerations previously described (*s*), but also by reference to her vital interests, in adhering to the present rule. At the same time, her attitude towards the proposed change is far from being one of unqualified hostility. She recognizes, as fully as any other Power, the desirability of limiting the incidence of war on individuals, and also of mitigating as far as possible its injurious effects as regards neutrals, and has already given evidence of this in her proposal that the right of capturing contraband should be altogether abandoned (*t*). But she also recognizes that if the proposed change is

(*n*) The power, that is, which her present naval superiority, coupled with the possession of ports and coaling stations in all parts of the world confers on her, of striking at the mercantile marine of an enemy and annihilating his carrying trade.

(*o*) This, at any rate, was the conclusion arrived at by the Royal Commission of 1905; see Report, par. 148; also Latifi, 130 *et seq.*

(*p*) In the face, that is, of the present legality of commercial blockade on the one hand, and the German doctrine of military necessity on the other; *supra*, p. 137.

(*q*) As being impracticable in fact as regards goods, for the reason that the requisite neutral tonnage would not be forthcoming; and impracticable in law as regards vessels, for the reason that these could not be legally transferred on or after the outbreak of war; *supra*, p. 138 n. (*k*).

(*r*) On this aspect of the subject, see Hall, 148; Westlake, ii. 129 *et seq.*; Westlake, Chapters on International Law, 245 *et seq.*; Lawrence, 414 *et seq.*; Latifi, ch. 5; Barclay, Problems, 63 *et seq.*; and for a tentative draft treaty embodying the exemption, 176.

(*s*) *Supra*, p. 137.

(*t*) This at the Hague Conference of 1907, see Pearce Higgins, 1; *et* p. 439 and n.

to be a reality it must go farther, and must include an abandonment not merely of the right of capturing private property but also of certain other forms of belligerent action (*x*), which neither Great Britain herself nor other maritime Powers are as yet prepared to concede. If in the future, however, some arrangement were found practicable for limiting armaments and lessening generally the risk of war, then Great Britain would probably be prepared to make this concession (*x*).

THE ENEMY CHARACTER OF VESSELS.

THE "VROW ELIZABETH."

1803; 5 C. Rob. 2.]

Case. During war between Great Britain and Holland, the "Vrow Elizabeth," a vessel sailing under the Dutch flag and pass, was captured by the British and sent in for adjudication. Condemnation was resisted on behalf of a German merchant resident at Bremen, who claimed the vessel as his property: alleging that she had been only nominally transferred to a Dutch merchant and placed under the Dutch flag for the purpose of enabling her to trade in that character between Holland and the Dutch colonies. This proceeding was admitted to have been a fraud on the Dutch navigation laws: but it was contended that the Court was in no way concerned to enforce these laws, and that so long as an actual neutral ownership could be shown the vessel was exempt from belligerent capture. In the result it was held that the mere fact of sailing under an enemy's flag and pass was conclusive as against the vessel: although not conclusive against the claim of the same owner for an undivided share of the cargo.

Judgment. Sir W. Scott, in his judgment, pointed out that the weight of evidence went to show that the vessel was really a Dutch ship. But, quite apart from this, it was an established rule that a vessel sailing under the colours and pass of a nation was to be considered as clothed with the national character of the country whose flag she bore. With goods it might occasionally be otherwise, but ships had always been held to the character with which

(*x*) See p. 137, *ante*. See Instructions [illegible] 1907, Parl. Papers, Miscellaneous No. 1 (1908); Pearce Higgins, 619 *et seq.*, Proceedings of the Hague Conference of

they were so invested, to the exclusion of any claim or interest which persons living in neutral countries might actually have in them (*a*).

The fact of a vessel sailing under the enemy flag is deemed to afford conclusive proof of her enemy character, even though it may be shown that she belongs in whole or part to a neutral. This rule rests on the ground that the use of that flag places the vessel under the protection and control of the enemy Government, and makes her amenable to its laws and liable to requisition in case of need. Inasmuch as the flag, moreover, must be presumed to have been used for the owner's advantage, he cannot be allowed to repudiate it in circumstances where it enures to his disadvantage. For these reasons the use of the enemy flag is held to affect the whole vessel with a hostile character and to bind all interests therein (*b*). So, in 1898, in the case of *The Pedro* (175 U. S. 354), it was held by the United States Supreme Court that a vessel flying the Spanish flag and owned by a Spanish corporation was liable to condemnation, notwithstanding that the legal or equitable ownership of the entire stock was in British subjects and the vessel herself insured with British underwriters.

In the principal case, indeed, it was suggested that this rule might admit of relaxation; although the examples given are of a very exceptional character (*c*). In 1870, it was relaxed by the French Courts in the case of *The Palme* (*d*), where a vessel belonging to a Swiss Missionary Society but carrying the German flag, was captured by the French, but released in consideration of the fact that Switzerland had no maritime flag of her own. Such a vessel would now be exempt from capture under the Hague Convention, No. 11 of 1907 (*e*), as being engaged on a religious mission, but not, it would seem, on the ground actually taken in the case of *The Palme* (*f*). The use of the enemy flag will not, however, affect with a hostile character goods found on board which are otherwise innocent and shown to belong to neutral owners; although all goods found on enemy vessels are presumed to have an enemy character unless the contrary is proved (*g*).

Under the law as hitherto administered by the British and American Prize Courts, although the use of the enemy flag is conclusive against the vessel, yet the use of the neutral flag, even

(*a*) It was admitted in the judgment that there might be exceptions to this rule; but these only touch the case of vessels which, in very exceptional circumstances, were allowed by their Government to place themselves under a foreign flag for a particular purpose.

(*b*) See *The Lisette* (4 Spinks, 144; *The Ariadne* (2 Wheat. 143); *The Friendschaft* (4 Wheat. 105); *The Cheshire* (3 Wall. 231).

(*c*) *Supra*, n. (*a*).

(*d*) *Dalloz*, 1872, iii. 91.

(*e*) Art. 4.

(*f*) Lattif, 80.

(*g*) See *The Carlos F. Rose* (177 U.S. 655; Scott, 637).

where a vessel is legally entitled to fly it, is not conclusive in her favour. This arises from the fact that under the Anglo-American doctrine the primary test of hostile connection as regards maritime capture is found in the domicile of the owner (*h*). Hence, if a vessel, even though flying the neutral flag, is found to be really owned, either in whole or part, by a person domiciled and carrying on trade in the enemy country (*i*), his interest therein is deemed to be confiscable, as being in fact the property of an enemy (*k*). This is based on the ground that, otherwise, it would be open to persons domiciled and trading in the enemy country to carry on the enemy trade without risk by registering their vessels (*l*) under the neutral flag (*m*). A vessel is also deemed to acquire an enemy character, even though flying the neutral flag, if she is virtually incorporated in the enemy navigation or trade (*n*); or if, whether owned by subjects or neutrals, she is found to be engaged in a trade carried on under the enemy's license (*o*). But these rules, in so far as they go behind the flag the vessel is entitled to fly, will, as we shall see, require to be revised if the Declaration of London should become operative (*p*). Finally, whatever the flag, or whatever the domicile of her owner, a vessel is deemed to have an enemy character if she has been chartered by or placed under the exclusive control of the enemy Government; although this really rests on the ground of unneutral service (*q*).

General Notes. *What are Enemy Vessels?*—The question of the enemy character of vessels is important, not only as determining the liability and actual treatment of the vessel itself, but also as affecting the liability of the cargo: for the reason that if the vessel is hostile, then, apart from the risks to cargo involved in the possible destruction of the vessel herself (*r*), all goods on board will be presumed to be enemy property and liable to condemnation

[illegible] p. 23.

[illegible] ascertained by reference to the ship's papers, or enquiry from the master, who is bound to be acquainted with the owners and commercial domicile of the vessel. See Manual of Naval Prize Law, Arts. 19, 20, 31.

In the case of [illegible] interest is [illegible] realized either by sale of the [illegible] neutral co-owners, or by the sale of the whole vessel and the accounting of the hostile interest: [illegible] Spinks, 18; Lutz, 81. [illegible] See Prize Rules 8, 9, 10, as to the conditions under which a vessel may be registered as a national vessel.

(*h*) *The Indian Chief*, Spinks, at 11; (*i*) *The Vigilantia*, 1 C. Rob. 1; *The Jonge Arend*, 2 C. Rob. 186.

(*k*) See *The Active*, 8 Cranch, 384; *The Venus*, 8 Cranch, 253; *The Hiram*, 8 Cranch, 444; Manual of Naval Prize Law, s. 19; and, for a recent example, *The Hoshi Maru*, Takahashi, 633.

(*l*) *Ante*, p. 143.

(*m*) *The Indian Chief*, Takahashi, i. 625; and p. 458, *ante*.

(*n*) Without those safeguards that are given by convention in the case of the destruction of neutral prizes; see p. 186, *ante*.

unless proved to be neutral (*s*); whereas if the vessel is neutral, then even enemy goods not being contraband will go free (*t*). With respect to what are enemy vessels, although there was, as we have seen, much divergence between the Anglo-American and Continental views as to the true criterion of enemy character (*u*), yet, on either view, it was recognized that a vessel flying the enemy flag was lawful prize. By the Declaration of London, 1909, it is now provided that, subject to the provisions respecting transfers (*x*), the enemy or neutral character of a vessel shall be determined by the flag she is entitled to fly; meaning thereby the flag under which, whether she is actually flying it or not, the vessel is entitled to sail, according to the municipal law which governs that right (*y*). This rule, in effect, affirms generally the test of the flag, whilst leaving it open to the captor to disprove the right to its use. At the same time, its effect will be to supersede, as between the parties to the Declaration, the practice under which, in determining the enemy character of ships, regard might also be had to other grounds of hostile association, such as the domicile of an owner or part owner (*z*). The right to fly a particular flag will depend on the municipal law of the State of the flag (*a*). Under the British system none but vessels owned by British subjects, or by corporations or companies established under British law and having their principal place of business in the British dominions, can own a British ship or any interest therein, or fly the national flag (*b*); whilst the American rules on this subject are even more stringent (*c*). But in some systems part ownership by a national, or even registration irrespective of what may be the nationality of the owner or crew, will entitle a vessel to fly the national flag (*d*). Hence, although the rule embodied in the Declaration is simple and easy of application, it fails at some points to secure that substantial justice which is ensured under the more complex rules of the British and American Courts (*e*).

(*s*) The effect being to throw the burden of proof on the neutral owner, in order to entitle him to restitution: see the Declaration of London, Art. 59.

(*t*) The Declaration of Paris, Art. 3.

(*u*) *Supra*, p. 28.

(*x*) Arts. 55, 56; p. 148, *infra*.

(*y*) Art. 57; and Report annexed to Declaration, Pearce Higgins, 66.

(*z*) Although the question of liability of neutral vessels engaging in trade closed to them in time of peace is expressly left open, see Art. 57, and p. 465, *infra*; whilst unneutral service, as defined by the Declaration, will also remain a ground of liability: see Arts. 45, 46; and p. 456, *infra*.

(*a*) See vol. i. 274.

(*b*) *Ibid.*

(*c*) See Moore, Digest, ii. 1003 *et seq.*

(*d*) See vol. i. 274.

(*e*) As by enabling a person domiciled in the enemy country to carry on its trade in vessels owned by him, but registered and sailing under the flag of some neutral country whose laws may be sufficiently elastic to admit of this, so long only as registration was effected before the war.

TRANSFERS TO THE NEUTRAL FLAG.

THE "ARIEL."

(1857: 11 Moo. P. C. 119.)

Case. On the 18th October, 1854, during the war between Great Britain and Russia, the "Ariel," a vessel flying the Danish flag, was seized at Belfast and proceeded against in the Court of Admiralty as being the property of one Sorensen, who was alleged to be a Russian and therefore an enemy subject. It appeared that the "Ariel" was originally built and owned by one Hagedorn, a merchant resident at Libau, in Russia: and that early in 1854, when war between Great Britain and Russia was imminent, one Eckhoff, the administrator of Hagedorn's estate, had empowered Sorensen, the Danish Consul at Libau, to sell the "Ariel" to his son, on certain terms. A sale on these terms was accordingly arranged at Hamburg, and on the 18th March a bill of sale and transfer of the ship to Sorensen, junior, was executed by Eckhoff: the purchase-money being 10,000 roubles, of which one-third was paid in cash, whilst the balance was to be paid in two equal instalments at three and six months respectively. In June, 1854, Sorensen, junior (his father having died) and Eckhoff desiring security, gave to the latter two acceptances for the unpaid instalments. At the time of transfer the "Ariel" was lying at Libau, but subsequently she made various voyages to Ireland, England, and America. The evidence went to show that Sorensen, although born in Russia, was at the time of the transfer carrying on business as a merchant and shipowner in Denmark, and that he had further been admitted to citizenship there as a burgher of Altona. In the Court of Admiralty, it was held that although the claimant had established his claim to the Danish character, and although the sale appeared to have been genuine, yet inasmuch as the seller had retained an interest in the vessel, the transfer could not be regarded as complete; and that on this ground both ship and freight were to be condemned as enemy property. But on appeal to the Privy Council, this decree was reversed and restitution granted, although without costs or damages, on the ground stated in the judgment.

Judgment. In the judgment of the Privy Council, which was delivered by the Rt. Hon. Sir John Patteson, the first question considered was that of the national character of the claimant. As to this it was held, notwithstanding certain circumstances of suspicion, that the appellant had fully established his claim to the Danish character. The next and important question was whether the appellant was the owner and sole owner of the "Ariel," at the time of capture. This depended on two points: (1 Had there been a genuine and absolute sale of the "Ariel" by the former Russian owners to the claimant without collusion or fraud? and 2 Did any interest on the ship remain in the seller at the time of capture?

On the question of the sale, the Court, after a careful examination of the facts, came to the conclusion that it was not only clear that the sale had been made in contemplation of war, but that the Russian shipowners at Libau, feeling that the war was at hand, had determined to sell their vessels at greatly reduced prices to neutrals, rather than keep them unemployed in Russian ports. There was therefore abundant proof that the sale was made *imminente bello*. Nevertheless, if the sale was absolute and *bonâ fide*, there was no rule of international law, at any rate as interpreted in this country, which made it illegal, even though made either *imminente* or even *flagrante bello*. The "Ariel," moreover, was in port at the time of sale, and therefore the cases as to the illegality of sales of vessels *in transitu* did not apply. Was the sale, then, absolute and *bonâ fide*? Undoubtedly, both the time at which the sale took place, the fact that the claimant had made himself a neutral for the express purpose of buying this and other ships, and his inability to pay the whole price, all tended to throw suspicion on it and made it incumbent on the Court to look closely into the history of the transaction. And if there had been facts leading to a well-founded conclusion that the ship was to be restored to the seller in the event of no war breaking out or in the event of a specific peace, or that the ship was to be employed by the claimant under the direction and for the benefit of the seller, then the Court would have been bound to hold the sale collusive and void, and to condemn the ship as enemy property. But on

review of the circumstances it did not appear that there was any evidence leading to either of these conclusions. Part of the purchase-money had been paid in cash and the postponement of the remaining payments was sufficiently accounted for: security had subsequently been given in the shape of certain acceptances, and a proviso that the earnings of the vessel should be applied in discharge of these had been duly carried out, with the result that only a small sum remained due at the time of capture. After the sale the vessel had passed under the sole control of the purchaser, and had not continued exclusively in the Russian trade. For these reasons it had been held in the Court below that the sale was *bonâ fide*, in the sense that it was real and intended to pass the property in the ship, without any engagement to restore it under any circumstances, and without fraud or collusion. And in this opinion the Judicial Committee fully concurred.

As to the second question—whether any interest in the ship remained in the seller, by reason of the balance of the purchase-money remaining unpaid, it appeared on a review of the cases that this fact alone did not create a lien on the freight and ship in favour of the seller, so as to render the ship when in the possession of a neutral owner liable to seizure by a belligerent (*a*). In the present case, however, there was also an engagement to pay out of earnings; and this, it was said, created an interest in and a lien on the freight, and through the freight on the ship. But even if the vendor had a lien on the freight, it would not follow that he had a lien on the ship, for these interests were quite distinct (*b*). Nor, indeed, even if it could have been shown that there was a lien either on freight or ship, would it have followed that such a lien would render the vessel, when in the possession of a neutral owner, liable to capture. Such liens, whether in favour of a neutral or an enemy's ship, or in favour of an enemy on a neutral's ship, were equally to be disregarded in a Court of Prize. In effect the whole case resolved itself into a question of *bona fides*; and that having been established the Court felt bound to conclude that the "Ariel" was the *bonâ fide* property of the claimants there, and that no interest remained in the seller.

(*a*) *The Vrow Margaretha*, 6 C. Rob. 214. (*b*) *The Weare*, 5 Price's Rep. 269.

According to the practice hitherto followed by the British Prize Courts the transfer of an enemy ship (*c*) to a neutral is not invalidated merely by the fact that it was made in contemplation of or even during war, so long as the transaction was genuine and complete and attested by appropriate evidence (*d*). But such a transfer would be invalid (1) if it occurred whilst the ship was in a blockaded port (*e*); or (2) if it was made whilst the vessel was *in transitu*, unless possession was actually taken by the purchaser before capture (*f*); or (3) if the vendor is shown to have retained any interest in the vessel or there was any agreement to reconvey her at the end of the war (*g*). If, however, the transfer was otherwise genuine, the mere taking of a lien on ship or freight for a part of the purchase-money, will not in itself affect its validity (*h*). But the onus of proving that the transfer was genuine will lie on the claimant, and if there are circumstances of suspicion which are not removed by him—as where there is no documentary evidence of the assignment on board, or the ship remains under enemy control—then it will be disregarded and the ship liable to condemnation as enemy property (*i*). And with this American practice will be found in the main to agree (*k*). But in neither system will the transfer of a ship of war by a belligerent to a neutral during the war be regarded as valid, even though this took place in a neutral port and after the vessel had been dismantled (*l*). And this, it is conceived, would now apply to any vessel that had been converted into a warship (*m*), even though subsequently reconverted (*n*). In some particulars, however, the British and American practice will need to be revised in the light of the provisions now made on this subject by the Declaration of London, in so far as these may become operative (*o*).

General Notes. *Transfer of Merchant Vessels from the Belligerent to a Neutral Flag.* In view of the risks of capture,

(*c*) Other than a ship of war.

(*d*) *The Bothnia* (11 Moo. P. C. 141); *The Benedict* (Spinks, 314); *The Bahia* (Spinks, 80).

(*e*) *The General Hamilton* (6 C. Rob. 62).

(*f*) Even though in a port short of the original destination: see *The Bel* [illegible] (Spinks).

(*g*) *The Stert* [illegible] (2 C. Rob. 100).

(*h*) *The* [illegible].

(*i*) *The* [illegible] (1 Moo. P. C. 271; *The* [illegible] (Spinks, 1[illegible] and generally, the Memorandum prepared for the use of the British delegates at the Naval Conference (Parl. Papers, 1909, Misc. No. 4), hereafter referred to as the British Memorandum.

(*k*) *The Sally Magee* (3 Wall. 451; Scott, 629, n.); *The Boedes Estrange* 176 U. S. 568; Scott, 624).

(*l*) *The Manilla* (6 C. Rob. 396); *The Georgia* (7 Wall. 32; Scott, 628, n.; Moore, Int. Arb. iv. 3957. As under II. C., No. 7 of 1907.

(*m*) See p. 132, *supra*, and on the subject generally, Hall, 505; Westlake, ii. 147 *seq.*

(*n*) *Infra*, p. 148.

(*o*) *Infra*, p. 148.

the enhanced rates of insurance, and the possible loss of employment, belligerent shipowners on the prospect of war often seek to safeguard their interests by transferring their vessels to neutrals. In some cases such transfers are genuine; but in other cases the owners, having regard to the lower prices obtainable when war is actual or imminent, seek to obtain the protection of the neutral flag by transfers which are merely nominal and collusive. The temptation to fraud, indeed, is so great that some States refuse to recognize any transfers made after the outbreak of war; whilst the practice of other States varies (*p*). Hence the subject of transfers to the neutral flag was included in the programme of the Naval Conference, and after discussion an agreement was reached, which is now embodied in the Declaration of London, 1909, Arts. 55, 56. The rules as there laid down are, as a reference to the text will show (*q*), somewhat complicated, but shortly their effect is as follows: (i.) As a general rule the transfer of an enemy vessel to the neutral flag, whether made before or after the outbreak of war, will be valid, unless shown to have been made in order to evade the consequences of the war; but if it was made before the war the onus of proving it to be invalid will lie on the captor, whilst if it was made after the war the onus of proving its validity will lie on the neutral. (ii.) In aid of the application of this general rule a number of subsidiary rules and presumptions are laid down: (1) As regards transfers made before the war: (a) if the transfer was made more than 30 days before the war, then there will be an absolute presumption in favour of its validity if it was unconditional, complete, in conformity with the law of the respective countries, and no control or share in the profits was reserved to the vendor. (b) By implication it appears that even if the transfer was made less than 30 days before the war, it will still be valid if the above-mentioned conditions were complied with; although in this case it will be open to the captor to annul it by positive proof that it was made for the purpose of evading the consequences of the war. (c) In any case, moreover, if the transfer was made within 30 days before the war and the bill of sale is not on board, there will be no presumption in favour of its validity; although it will still be open to the claimants to establish its validity by proof that the above-mentioned conditions [illegible] (2) [illegible] (a) [illegible] (b) [illegible] (c) [illegible] (d) [illegible]

(*p*) Papers [illegible] No. [illegible] pp. 50, 52, 57.

(*q*) [illegible] Art. [illegible]

[illegible] transferred to an enemy flag [illegible] the bill of sale [illegible] the vessel's papers [illegible] [illegible] [illegible]

(2.) As regards transfers made after the war. (a) Any such transfer will in general be treated as invalid unless the owner can show that it was not made with a view to evade the consequences of the war (*s*). (b) If the transfer was made whilst the vessel was *in transitu* or in a blockaded port, or if a right of repurchase was reserved to the vendor, or if the requirements of the law of the flag were not fulfilled, then the presumption of invalidity will be absolute and the vessel subject to condemnation (*t*).

ENEMY GOODS.

I. GENERALLY.

THE "SAN JOSÉ INDIANO."

[1814: 2 Gall. 268, 311.]

Case. In 1813, during war between Great Britain and the United States, the "San Jose Indiano," a ship sailing under the Portuguese flag and having on board cargo belonging to various owners, was captured by an American privateer, whilst on a voyage from Liverpool to Rio de Janeiro. In the present proceedings, which were by way of appeal from a decree of the District Court of Maine to the Circuit Court of Massachusetts, the more important questions were: 1. The liability of the ship, restitution of which was claimed as being a Portuguese vessel and the property of Costa & Co., of Liverpool, a firm several of whose members were alleged to be domiciled in Brazil (*a*); 2. the liability of certain goods which had been shipped by Dyson Bros., of Liverpool, to Dyson Bros. & Finney, of Rio de Janeiro, restitution of which was claimed as being neutral property, at any rate as regards the share of Finney, who

on board shall render her suspect, and have the effect of shifting the burden of proof, as regards the [illegible] and regularity of the transaction, from the captor to the neutral.

(*s*) The effect of this is to throw on the owner the burden of establishing both the [illegible] and regularity of the transactions in accordance with the conditions previously indicated.

(*t*) See British Memorandum, 99–100; and Report annexed to Declaration, Pearce Higgins, 600 *et seq.*

(*a*) Then a dependency of Portugal, a neutral country.

was domiciled and carried on business at Rio (*b*); and (3) the liability of certain goods which had been consigned by Dyson Bros., of Liverpool, to Dyson Bros. & Finney, of Rio de Janeiro, but which had been purchased by order and on account of one Lizaur, a neutral merchant carrying on business in Brazil, in whom the property was consequently alleged to be vested (*c*). In the result, however, all these claims were rejected by the Court for the reasons assigned in the judgment.

Judgment. Story, J., after referring to the facts, proceeded to deal *seriatim* with the various claims that had been made. With respect to the ship which was alleged to belong to Costa & Co., it appeared that two members of this firm were domiciled in England and two in Brazil; but the bill of sale showed the ship to belong to the partners domiciled in England, and hence the ship herself, even though under the Portuguese flag, being really owned by persons residing in England, must be condemned as lawful prize. With respect to the claim of Dyson Bros. & Finney, of Rio, for goods shipped to them by Dyson Bros., of Liverpool, it appeared from the evidence that the houses at Liverpool and Rio really consisted of the same persons, although one of them was domiciled at Rio. As to two-thirds of this portion, being the interest of those who were domiciled in England, the right to condemn was unquestionable (*d*). As to the other third, being the interest of Finney who was domiciled at Rio, it was claimed by the captors that this should also be condemned, as being the property of a person connected with a house of trade in the enemy country who had continued that connection after and during the war. As a general rule the national character of a person for this purpose depended on his domicile. But the property of a person might acquire a hostile character altogether irrespective of his residence, either through the origin of the property or the traffic in which it was engaged; as where such property was embarked in a colonial or coasting or any other privileged trade of the enemy, or was the produce of

(*b*) These two firms virtually consisted of the same parties, although the Brazilian business was carried on by Finney, who was domiciled at Rio.

(*c*) These goods had been ordered on account of Lizaur, but Dyson Bros., of Liverpool, not being willing to trust the former had consigned the goods to the firm of Dyson Bros. & Finney.

(*d*) See *ante*, p. 25.

an estate owned in the enemy country (*e*). The principle appeared to be that where a person was engaged in the ordinary or extraordinary commerce of an enemy's country on the same footing and with the same advantages as native resident subjects, his property so employed was regarded as incorporated into the commerce of that country, and was subject to confiscation, whatever might be his residence. And this appeared to be reasonable: for such trade had a direct effect in adding to the resources and revenue of the enemy and in alleviating the pressure of the war. There was no reason, therefore, why one who enjoyed the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and losses. It would be too much to hold him entitled by mere neutral residence to carry on a substantially hostile commerce and yet to have all the advantages of the neutral character. The case before the Court came fully within the range of this principle (*f*). Nor was its application affected by the fact that the shipment in this case was from the enemy country to the connected house in the neutral country. Hence the share of Mr. Finney, who was domiciled in Brazil, must follow the same fate as the other shares in this part of the cargo. With respect to the claim on behalf of J. Lizaur, the only question was in whom the property vested during its transit. If it vested in Lizaur then it should be restored, but if in the shippers then it should be condemned. It was contended that no interest remained in the shippers except a mere right of stoppage *in transitu*. But the doctrine of stoppage *in transitu* applied only in the case of insolvency and presupposed not only that property had passed to the consignee but also that possession was in a third party and could not therefore touch a case where the actual or constructive possession still remained in the shipper or his exclusive agent. The true rule was that where a merchant abroad in pursuance of orders either sold his own goods or purchased goods on his own credit, thereby becoming the owner, no property would vest in his correspondent, until the former did some notorious act to divest himself of his title, or else parted with possession by an

(*e*) *The Phœnix*, 5 C. Rob. 20; *The Imina Gebroeders*, 4 C. Rob. 232. (*f*) Reference was made to *The Paul*, 3 C. Rob. 46; *The Lucy Klassen*, 5 C. Rob. 302; *The Hermosa*, 4 C. Rob. 228; and other cases.

actual and unconditional delivery for the use of such correspondent. Until then the former must be deemed to retain the exclusive property as well as possession. And this was not only the general law, but the prize law of the country. For this reason the claim of Lizaur must also be rejected.

This decision, although not that of a Court of last resort, is noteworthy both as proceeding from a judge of the first authority in this branch of law, and as embodying a compendious statement of the principles governing the liability of property, both in ships and goods, under the Anglo-American practice; although the conclusions arrived at will, on some points, now need to be revised in deference to recent Conventions. (1) In the first place, it affirms and illustrates the liability, under that practice, of vessels which, even though under the neutral flag, belong to persons domiciled in the enemy country; although on this point the decision must now be read in the light of the provisions contained in the Declaration of London, in so far as that Declaration may become operative (*g*). (2) Next, it affirms and illustrates the Anglo-American rule, that the liability of goods also depends primarily on the neutral or enemy character of the owner as ascertained by his domicile (*h*); although this again is now qualified by the provisions of the Declaration of Paris (*i*) under which the neutral flag covers even enemy goods, with the exception of contraband of war. (3) At the same time it recognizes the existence, under the Anglo-American practice, of cases in which an enemy character will be attributed to persons and their property for the purposes of maritime capture, on other grounds than domicile or residence in the enemy country. These comprise cases [illegible] person, even though resident in a neutral country, has an interest in a house of trade in the enemy country (*k*), which, as we have seen, has the effect of investing him with an enemy character as regards all property connected with that interest (*l*); (b) where a person, even though resident in a neutral country, carries on some privileged trade of the enemy, which again invests him with an enemy character as regards property connected with that trade (*m*); and (c) where a person, even though resident in a neutral country, owns an estate in the enemy country, which has the effect of investing him with an enemy character as regards the produce of such estate still

(*g*) See Art. 57, and p. 145.
(*h*) Art. 2.
[illegible] p. 23.
[illegible] of [illegible] Article [illegible] of Maritime Law, 119.
(*k*) See p. 25, [illegible] and cases [illegible]. But this will not apply [illegible] where a neutral does not merely have a resident agent in the enemy country, the agent in such being only an instrument for facilitating business that originates in and is properly connected with the neutral country: see Hall, 393.
(*l*) See p. 155.

remaining in his hands (*o*). (4) Finally, the judgment deals with the tests to be applied in determining the enemy character of property consigned by an enemy to a neutral (*p*). These cases, in so far as they have not already been dealt with, will be considered in the sections immediately following; although, as regards all alike, it is necessary to remember that the question of the liability of goods by reason of their enemy character can now only arise when they are found on enemy ships—a limitation which greatly narrows their scope.

(ii) PROPERTY EMBARKED IN A PRIVILEGED TRADE.

THE "ANNA CATHARINA."

1802: 4 C. Rob. 107.]

Case. In 1801, during war between Great Britain on the one hand, and Spain and Holland on the other, the "Anna Catharina," a Danish vessel, was captured by the British whilst on a voyage from Hamburg to a Spanish port, with a cargo of linen, wines and cheese. The cargo appeared to have been shipped under the following circumstances: In 1799 a contract was made between the Spanish Government of the Caracas and one Robinson, an American trader at Curaçoa, for the purchase by the latter of all the tobacco in the Government warehouses at Porto Cabello, La Guayra, and Guyana, payment to be made in flour, dry goods, and specie. Messrs. Sontag & Co., of Hamburg, were entrusted by Robinson with the carrying out of this contract, Robinson taking one-third of the profits. In the result the cargo was condemned on the ground that, having been shipped under a contract with the Spanish Government, it was to be regarded as Spanish

(*o*) See p. 156, *ante*. It may, indeed, be a question, and one highly important under Art. 58 of the Declaration of London, whether in all these cases the hostile character is not an attribute rather of the property than of the person; and, therefore, excluded by virtue of that section, in so far as it may become operative: see p. 162, *post*. (*p*) But in the Anglo-American decisions the enemy character of goods appears throughout to be based on the enemy character of the owner, a view which if upheld would leave them operative under that section.

(*q*) *Ante*, p. 158.

property: and also on the ground that the nature of the contract, involving as it did the grant of a monopoly by the Spanish Government, was such as to impress on the persons carrying it out the character of Spanish traders, and consequently to imbue them with a hostile character.

Judgment. Sir W. Scott in his judgment, after considering the nature of the contract between Robinson and the Spanish Government, held that although such a contract became illegal, as involving a trade with the enemy, as from the time when Curaçoa passed into the hands of the British and Robinson became subject to British law (*a*), yet the consequences of such illegality would not affect the property in the hands of Sontag & Co., on whose behalf the claim was made. But on the question as to whether such property was not liable as enemy property, the learned Judge, after reviewing the circumstances, held that inasmuch as it was going in time of war to the port of a belligerent, under a contract to become the property of the belligerent immediately on arrival, the property must be considered as being in the Spanish Government, and therefore as having a hostile character. As to the further question whether the contract did not fix on Robinson and those claiming under him the character of Spanish traders, he also held that a contract of that kind, giving Robinson a monopoly of trading rights, taken in conjunction with the fact that he had a resident agent on Spanish territory for the purpose of carrying out the undertaking, had the effect of imbuing him with a Spanish, and therefore a hostile character. As to Messrs. Sontag & Co., they had participated in the benefit of this contract under arrangements made by Robinson, and they must therefore be deemed to take it subject to its legal consequences, among which was that of the liability of the cargo to condemnation in the event of its capture by an enemy of Spain. The cargo was therefore condemned; a claim for freight being refused on account of some prevarication in the evidence.

(*a*) Curaçoa surrendered to the British in 1800, although afterwards restored to Holland.

The seizure in this case was, it will be seen, effected on a neutral vessel, which would not now be permissible if it could be shown that the vessel was in fact entitled to fly the neutral flag. Subject to this reservation, the case serves to illustrate (1) that the acquisition by Great Britain of what was previously enemy territory will have the effect of suspending or abrogating all contracts subsisting between persons there domiciled and persons domiciled in the enemy country, although this will not affect any property passing thereunder which has already become vested in neutrals (*b*); (2) that goods consigned to the enemy country under contract to become the property of persons there domiciled are liable to condemnation as enemy property (*c*); and (3) that property, even though owned by a neutral, will be deemed to have an enemy character if embarked in a trade which is carried on by virtue of some special privilege or monopoly granted by the enemy Government. According to the British practice, moreover, the same character will attach to property embarked in a trade which prior to the war was confined to enemy subjects, or which is undertaken in relief of the enemy from the pressure of the war (*d*).

(iii) THE UNSOLD PRODUCE OF SOIL OWNED IN ENEMY TERRITORY.

THE "PHŒNIX."

[1803: 5 C. Rob. 20.]

Case. During war between Great Britain and Holland, the "Phœnix" was captured when on a voyage from Surinam to Holland, and brought in for adjudication. The cargo was claimed on behalf of persons then resident in Germany, as being the produce of estates owned by them in Surinam. Nevertheless, the property was condemned as being the produce of the soil of enemy territory still remaining in the hands of the owners of the soil.

Judgment. Sir William Scott, in giving judgment, laid it down as a fixed principle that the possession of the soil impressed

(*a*) *Supra*, pp. 31, 66.
(*b*) *Infra*, p. 158.
(*c*) See *The Imina*, 2 C. Rob. 186; *The Rendsburg*, 4 C. Rob. 121; *The Princess*, 2 C. Rob. 19; *The Four Anne Catharina*, 5 C. Rob. 161; *The Manteau*, Takahashi, 633; *infra*, p. 463; and, as to the personal derivation of this character, *infra*, p. 153, n. (*a*).

upon the owner the character of the country, so far as the produce of that plantation was concerned, and whilst this was being transported to any other country, whatever the local residence of the owner might be. In the present case the estates in question were acquired by descent, and as such they were by no means marked out for any favourable distinction. If they had been a late acquisition, there might have been room for the supposition that they had been acquired whilst the place was under British control, and that the owner had been induced by that circumstance to form an establishment there under the protection of the British Government. But having fallen by descent on these persons from their ancestors in Holland, these plantations must be considered to carry with them the disadvantages as well as the advantages attaching to the Dutch character. Being the produce of the claimant's own plantations in the colony of the enemy, the property must fall under the general law, and must be pronounced subject to condemnation.

Under the British and American practice, the owner of an estate in the enemy country (*a*) is regarded as having an enemy character in respect of the produce of that estate so long as it remains in his hands, even though he may be resident elsewhere. This is sometimes treated as a special exception, based on the fact that the ownership of land in the enemy country identifies the owner to that extent with the interest of the enemy State (*b*); but in fact it appears to be only a particular application of the rule already referred to, which treats the carrying on of any business in the enemy territory, including agriculture, as conferring an enemy character as regards all property connected therewith until it has passed into other hands (*c*). This decision was followed in the American decision of *Bentzon* v. *Boyle* (9 Cranch, 191), where it was held that a cargo of sugar, the produce of estates in Santa Cruz, but owned by a person resident in Denmark, was liable to capture and condemnation as enemy property during war between Great Britain and the United States, on the ground that Santa Cruz must, since its seizure by Great Britain, be regarded as enemy territory, and the sugar as the produce of enemy soil still in the hands of the owner (*d*).

(*a*) [illegible] See Westlake, ii. 152 [illegible] n.
(*b*) See [illegible] 652.
(*c*) 5 C. Rob. at 167 [illegible] 197. (*d*) 8 Cr. 598.

(iv) GOODS PASSING BETWEEN NEUTRALS AND ENEMIES.

THE "SALLY" (*a*).

[1795; 3 C. Rob. 300, n.]

Case. In this case the question was whether a cargo of corn, which had been shipped in America for a French port and captured by the British, during war between Great Britain and France, was liable to condemnation as enemy property. The corn had been shipped by an American firm at Baltimore, ostensibly at the risk and on account of another American firm; but was in fact consigned, by endorsement of the bill of lading, to an enemy; the evidence tending to show that it was really intended for the French Government. The cargo was condemned by the Lords Commissioners of Appeal on the ground that in the circumstances, and as property consigned by a neutral to a hostile port to become the property of the enemy on arrival, it must be regarded as enemy property.

Judgment. In the judgment it was stated to be a rule of the Prize Courts, that property intended to be delivered in the enemy's country and under a contract to become the property of the enemy immediately on arrival, was, if taken *in transitu*, to be considered as enemy property. Where such a contract was made in time of peace or without any contemplation of war the rule did not apply. But in a case like the present, where the form of the contract was framed directly for the purpose of obviating danger apprehended from approaching hostilities, the rule would take effect. Although by the bill of lading the property purported to be on account and at the risk of an American merchant, the evidence went to show that it was really intended for the French Government. Assuming that it was to become the property of the enemy on delivery, capture would be con-

(*a*) This case deals with property consigned by a neutral to an enemy. For an example of the converse case of property consigned by an enemy to a neutral, see *The Sea Nymph Indiana*, p. 149, *supra*.

sidered as delivery; and as the captors, by the rights of war, stood in the place of the enemy, they were entitled to have the goods passing under such a contract condemned as enemy property.

As a general rule, where goods are consigned by a merchant in one country to a merchant in another, the property in them is deemed to vest in the consignee as from the time when they are delivered to the master of the ship by which they are to be carried, the master being treated as the agent of the consignee for this purpose. In time of peace this presumption may be varied by agreement or custom of trade. But in time of war—and where goods are consigned by a neutral to an enemy—such an agreement or custom would not be recognized by the British and American Prize Courts, for the reason that such an indulgence would inevitably be taken advantage of by enemy consignees as a means of protecting the property from capture during transit (*b*). Nevertheless, in the converse case—where goods are consigned by an enemy to a neutral, and these are taken on an enemy vessel—they will, as we have seen, be presumed to be enemy property, and will be liable to condemnation unless it is shown that the property in them has already become vested in the neutral consignee, and that the consignor retains no further interest therein (*c*). In such a case, in fact, the law imposes on the neutral consignee the burden of proving that the property in the goods has become vested in him fully and finally, save only for the consignor's right of stoppage *in transitu* in the event of the consignee's insolvency (*d*). Nor does this rule appear to be unreasonable, having regard to the fact that in the case of a sale which is genuine and complete such proof is always at the disposal of the consignee (*e*).

v. TRANSFERS MADE *IN TRANSITU*.

THE "VROW MARGARETHA."

(1799; 1 C. Rob. 336.)

Case. In this case it appeared that in 1794, before the outbreak of war between Great Britain and Spain and Holland, certain parcels of brandy had been shipped by Spanish merchants and consigned in Dutch vessels to a firm in Holland. During transit these bundles were transferred to one Berkeymeyer, a merchant

(*b*) *The* [illegible] 2 C. Rob. 25 (*c*) *The Indian Chief*, 3 C. Rob. 12; *The Jonge Klassina*, 4 C. Rob. 137; *The Jonge Margaretha*, 4 C. Rob. 94; *The Jonge Pieter*, 4 C. Rob. 79; *The Vrow Margaretha*, 1 C. Rob. 336; *The Vrow Judith*, 1 C. Rob. 150; *The Vrow Johanna*, 4 C. Rob. 87

of Hamburg; but before they arrived at their destination war broke out, with the result that the vessels were captured by the British and condemned. It was now sought to condemn the brandies, on the ground that having once been shipped as enemy property their enemy character could not be divested by transfer to a neutral during transit. But in the result restitution was decreed, for the reasons given in the judgment.

Judgment. Sir W. Scott, in giving judgment, observed that although in time of peace a transfer *in transitu* was perfectly permissible, yet where a state of war existed or was imminent the property in goods must be deemed to continue, until actual delivery, in those parties in whom it was vested at the time of the shipment. This arose out of the conditions of war which entitled a belligerent to seize upon the goods of his enemy. If such a rule did not exist all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. He therefore recognized it as a rule of the Court, that property could not be converted *in transitu*. This rule, however, became applicable only on the outbreak of war, and had no application to transactions that took place during time of peace. In the present case the transfer *in transitu*, having occurred before the war and in time of peace, must be adjudged according to the ordinary rules of commerce, and there being nothing to raise any suspicion as to its *bona fides*, the cargo must be restored to the claimant.

It often happens that goods are not shipped to any named consignee, the shipping documents being merely endorsed to the order of the merchant who ships them, or to that of the banker to whom he sells his bills, with the result that the ownership often changes during the voyage. In time of peace it is quite competent to an owner in such a case to transfer his interest, even though the goods are *in transitu*. But in time of war, according to the rule of the English and American Prize Courts, goods belonging to an enemy, once shipped, will retain their enemy character until they reach their destination, and no transfer of them to a neutral will be effective, so as to defeat the right of capture, unless the transferee has actually taken possession of them. As was remarked in the judgment, if such a rule did not exist, all

enemy goods would be protected by transfers which it would be impossible to detect. Transfers of goods *in transitu* made before the war are, indeed, *primâ facie* valid, but even such transfers will be invalidated if they can be shown to have been made in contemplation of war and with a view of avoiding its consequences (*a*). Nevertheless, if before capture a neutral consignor exercises a right of stoppage *in transitu* on the bankruptcy of the enemy consignee — a right conferred both by the English law and in most other systems — the re-transfer in law of the goods to the original owner will be recognized, notwithstanding that it occurred whilst the goods were in transit (*b*).

OUTSTANDING INTERESTS IN ENEMY VESSELS OR GOODS.

THE "TOBAGO."

[1804: 5 C. Rob. 218.]

Case. This was a case of claim to a captured French vessel, made on behalf of a British resident, as the holder of a bottomry bond on the vessel executed in his favour by the master of the ship before the commencement of hostilities between Great Britain and France. The claim was, however, rejected on the ground that the Court could not recognize liens on an enemy vessel, even though created before the war, and even though in favour of neutrals or British subjects.

Judgment. Sir W. Scott, in giving judgment, observed that the integrity of the transaction was not impeached. The question, however, was whether the Court could, consistently with the principles of law that governed its practice, afford relief. A bottomry bond given in peace to relieve a ship in distress was indeed regarded with favour by the Court. But could the Court recognize such bonds as titles to property, on which a claim for restitution could be founded in a Court of Prize? The total absence

(*a*) *The Jonge Klassina*, 5 C. Rob. 297; *The Hoop*, 1 C. Rob. 196; *The Venus*, 8 Cranch, 253; *The Ocean Bride*, 2 Gall. 268, 311; and as to the right of stoppage *in transitu* in English law, the Sale of Goods Act, 1893, ss. 44 *et seq.*

of any precedent showed that that had not been the practice of the Court. A person advancing money on a bond of this nature acquired no property in the vessel; he acquired the *jus in rem* but no *jus in re* until after appropriation by judicial process. The property therefore continued in the former owner. But if there was no change of property there could be no change of national character. Those lending on such a security must take it subject to the risks of war. It was claimed, indeed, that the captor took the thing *cum onere;* and this was no doubt true where the *onus* was immediately and visibly incumbent on it. But it was a very different thing to claim the same consideration for a mere right of action residing in a neutral. It was obvious, too, that claims of this character might be so framed that the Court could not examine them with effect, as being private contracts between parties who had an interest in colluding. The right of capture over enemy property, therefore, operated without regard to secret liens possessed by third parties. Nor did the right of capture operate on such liens in cases where the property itself was protected from capture. If such a claim as the present were allowed, a captor would be subject to the disadvantages of having neutral liens set up to defeat his claims on hostile property whilst he could never entitle himself to any advantage from hostile liens on neutral property. All consideration of such liens or incumbrances must therefore be excluded.

On grounds both of principle and convenience, the Courts, in cases of maritime capture, reject all claims founded on liens arising out of bottomry bonds, mortgages, the supply of necessaries, and bills of lading. Where such liens exist over enemy property in favour of neutrals or subjects they are overridden by the claims of the captor. Where they exist over neutral property in favour of enemies they cannot be attached by the captor *a fortiori*. And this principle is applied by the British and American Courts equally to ships and goods *in transitu*. Nevertheless, the lien of an unpaid vendor is, as we have seen, recog-

[illegible], p. 146.

The Hampton, 5 Wall., 372; *The Horizon*, 6 C. Rob., 24; *The Peterhoff*, 6 Wall., 198; *The L'Actif*, Spinks, 264; *The Gaetano Donizetti*, 177 U. S., 655; Scott, 637; and as to certain exceptional cases in relation to outlay, *The Belvedere*, 1 Dods., 353; *The Aline*, Spinks, 82; and for a case decided during the Russo-Japanese war, *The Nigretia*, Takahashi, 552.

nized to the extent of supporting a re-transfer from an enemy consignee to a neutral consignor, in the event of the bankruptcy of the former (*c*).

General Notes. *The Enemy Character of Goods generally.* The question of the liability of goods, as having an enemy character, can now only arise as to goods found in enemy vessels (*d*). As regards such goods, the Declaration of London now provides that in the absence of proof of their neutral character they are presumed to be enemy property (*e*); which merely gives expression to the customary rule already referred to (*f*). It is also commonly recognized that the enemy character of goods depends on the enemy character of the owner (*g*). But this, as has already been pointed out, is determined according to the practice of one group of States—including Germany, Austria, France, Italy, and Russia (*h*)—by the principle of nationality; whilst according to the practice of another group of States—including Great Britain, the United States, Japan, Holland, and Spain—it is determined primarily by the principle of domicile (*i*). At the Naval Conference it was found impossible to reach any agreement on this subject. Hence the Declaration of London, Art. 58, merely provides that the neutral or enemy character of goods found on board an enemy vessel shall be determined by the neutral or enemy character of the owner. This, it will be seen, makes no provision as to how the neutral or enemy character of the owner shall be determined; and thus leaves the question between "nationality" and "domicile" open for future settlement, either by convention or by the International Prize Court. But until then the Courts of Great Britain and the United States will, even if the Declaration of London should be adopted, continue to apply the test of domicile.

The effect of Art. 58 on other tests applied under the British practice.—It will have been noticed that the British and American Courts recognize, in addition to domicile, other grounds of liability, such as the possession of a house of trade or an agricultural estate in the enemy country, or the conduct of a privileged trade; any of which will confer an enemy character as regards property connected therewith, irrespective of the residence of the owner (*j*). If the Declaration of London should be adopted, the question will necessarily arise as to how far these ancillary tests of enemy character are affected by Art. 58. As to this it is conceived that the real principle underlying the British and American deci-

(*c*) See p. 160.
(*d*) Declaration of Paris, 1856, Art. 2.
(*e*) Art. 59.
(*f*) *See The Ocean*, 5 *Wheat. U. S.* 177; 5 *U. S.* 655; and 1 *Kyll.* 141, *et seq.*
(*g*) See p. 153, n. (*c*), *supra*.
(*h*) See Parl. Papers 1909, Misc. No. 5, pp. 31, 2, 24, 46, 56.
(*i*) *Ibid.* 27, 50, 52.
(*j*) See (*c*), pp. 155, 156.

sions on this subject is that of hostile association; the existence, that is, of some bond implying protection and trade benefit on the one hand, and subjection to the enemy control and contribution to his resources (*l*) on the other—which serves to identify the person in question with the enemy State, either fully, as in the case of domicile, or *quoad* all property connected with the source of hostile association, as in other cases. And it is this underlying principle—of which "domicile" is really only an application (*m*)—which really has to be contrasted with "nationality." If this be so, then it would seem that none of these applications of the Anglo-American doctrine would strictly be affected by Art. 58; for the reason that they are all deductions from the common principle of hostile association, which, under that doctrine, is deemed to confer upon the owner of the goods a general or limited "enemy character," as the case may be—within the meaning of Art. 58. But if the test of "nationality" should be ultimately adopted, then, of course, the whole fabric on which the Anglo-American doctrine is built up would fall to the ground.

Transfers in transitu.—With respect to these, the Declaration of London now provides that enemy goods on board an enemy vessel shall be deemed to retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities and whilst the goods are being forwarded (*n*). This, again, merely gives effect to the rule now generally recognized that the enemy character of goods cannot ordinarily (*o*) be changed during their transit; which is itself based on the grounds set forth in the judgment in *The Vrow Margaretha* (*p*). But whereas, under the British practice, transfers made before the war, even though *primâ facie* valid, may be vitiated by proof that they were made in contemplation of war and with a view to evade its consequences (*q*), under the provisions of the Declaration of London this will no longer be the case, and to this extent the British rule will need to be revised if the Declaration should become operative.

The Lien of an Unpaid Vendor. Notwithstanding the rule that transfers *in transitu* will not in general be valid if made after the war, the Declaration of London provides, in effect, that if prior to the capture of goods consigned by a neutral to an enemy the former exercises, on the bankruptcy of the latter, a recognized legal right to recover the goods, they will regain their neutral character (*r*). This, whilst not otherwise impugning the rule that neutral liens over enemy goods may be disregarded (*s*), or the rule which forbids transfers *in transitu* after the war, yet recognizes the lien of an

(*l*) Including taxation, whether ordinary or extraordinary.

(*m*) Although it has been sought to extend it by the use of the term "commercial domicile": see vol. i. 209.

(*n*) See Art. 60, par. 1; App. xiii. c. 6.

(*o*) And saving the case mentioned below.

(*p*) *Supra*, p. 159.

(*q*) *Supra*, p. 160.

(*r*) See Art. 60, par. 2; and as to the actual terms employed, App. xiii. c. 6.

(*s*) *Supra*, p. 161.

unpaid neutral vendor, in so far as to treat as valid the re-transfer to him which will take place upon the exercise of a right of stoppage *in transitu* on the bankruptcy of the enemy consignee, so long as this right is conferred by the law which governs the contract and has been exercised before actual capture. This agrees in the main with the Anglo-American practice already described (*t*).

RESTRICTIONS ON MARITIME CAPTURE.

(i STATUS OF ENEMY MERCHANT VESSELS ON OUTBREAK OF WAR.

THE "BUENA VENTURA."

[1899: 175 U. S. 384.]

Case. On the 25th April, 1898, the United States issued a declaration of war against Spain, which, amongst other things, recited that a state of war had existed since the 21st April. On the 22nd April the "Buena Ventura," a Spanish merchant vessel, was captured by a United States cruiser off the American coast, and sent in for adjudication. The "Buena Ventura" had arrived from Cuba at an American port about the 31st March; had left that port on the 19th April; and was at the time of her capture proceeding to another American port for the purpose of taking bunker coal. At the time of capture, those on board her were unaware of the war. On the 26th April, 1898, the President issued a proclamation providing, in effect [1] that Spanish merchant vessels in any ports or places within the United States should be allowed till the 21st May, 1898, inclusive, for loading and departure, and should, if met at sea, be permitted to continue their voyage, if it appeared that their cargoes had been taken on board within the time allowed, and subject to the condition of their not having on board any officer in the naval or military service of the enemy or contraband (*a*); and (2) that any Spanish merchant vessel which, prior to the 21st April, had sailed from any foreign port for any

(*t*) *Supra*, p. 162.

(*a*) Or any despatch from or to the Spanish Government; sect. 4.

port or place in the United States, should be permitted to enter, discharge, and depart, and should, if met at sea, be permitted to continue her voyage to any port not blockaded (*b*). In the District Court a decree of condemnation was pronounced (*c*); but on appeal to the Supreme Court this decree was reversed, and the vessel released.

Judgment. In the judgment of the Supreme Court, which was delivered by Peckham, J. (*d*), it was laid down that, in view of the fact that enemy merchant vessels carrying on innocent commercial enterprise either at the time or just before the time when hostilities began were according to the later practice of civilized nations entitled to liberal treatment, the terms of the President's proclamation ought to receive the most extensive interpretation of which they were capable (*e*). The provision that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21st, 1898, inclusive, for loading their cargoes and departing" might be held to include (1) only vessels in port on April 26th when the proclamation was issued; or (2) those in port on April 21st, when war was declared by Congress to have begun; or (3) not only those then in port, but also any that had sailed therefrom on or before May 21st, whether before or after the commencement of the war or the issuing of the proclamation. The Court preferred to adopt the last interpretation. Although the proclamation did not in so many words include vessels which had sailed from the United States before the commencement of the war, such vessels were clearly within its intention under the liberal construction which the Court felt bound to give it. To attribute to the Executive an intention to exempt vessels which had sailed from United States ports after April 21st and before May 21st, and to refuse it to vessels which had sailed before April 21st would be altogether unjustifiable. Hence, in the present case, the vessel, although she had actually left a United States port on April 19th, must be released. In view, however, of the fact that at the date of seizure, April 22nd,

(*a*) Sect. 5.

(*b*) The vessel was in fact ordered to be sold; the proceeds, however, being deposited to abide the result of appeal.

(*d*) Fuller, C.J., and Gray and McKenna, JJ., dissenting.

(*e*) *The Phoenix* (1 Spinks, 306) and *The Argo* (Spinks, 52).

the proclamation had not actually been issued, restitution would be granted without damages or costs (*f*).

The terms of the proclamation issued by the President at the commencement of the Spanish-American war of 1898, afford an illustration of what is spoken of in the judgment as "the later practice of civilized States" in its more liberal form. Briefly that practice was one under which enemy merchant vessels found either in or on their way to the national ports, after the commencement of hostilities, were, under certain conditions, exempted from capture, and commonly allowed to return unmolested to some port of their own country (*g*). In *The Buena Ventura* the Supreme Court, as we have seen, gave to this practice, as embodied in the President's proclamation, the broadest possible interpretation. In the case of *The Pedro* (175 U. S. 354), however, it was held not to apply to a vessel trading from one port of the enemy to another, and carrying cargo exclusively for the enemy, even though under contract to proceed ultimately to a United States port. In *The Panama* (176 U. S. 535), it was held not to apply to a vessel which, although otherwise within the protection of the proclamation, was carrying an armament susceptible of use in war, and was moreover under contract to the enemy Government for use in war. In *The Nadajda* (Takahashi, 604), it was held by Japanese Courts not to apply where an enemy vessel had remained in port after the days of grace had expired. This practice has, as we shall see, now been embodied, although with some stints and deductions, in the Hague Convention, No. 6 of 1907. But in cases not covered by the Convention, vessels which enter an enemy port after the war will still remain subject to the ordinary rule of maritime capture (*h*).

General Notes. *The Position of Enemy Merchant Vessels on the Outbreak of War:* (i) *Under the Customary Law.* Enemy merchant vessels found in the national ports after the commencement of war remained liable to capture long after the practice of appropriating enemy property on land had been in general abandoned: the capture in such a case ranking as a maritime capture (*i*). But about the middle of the 19th century we notice the rise of a new usage, under which, in its more liberal form, enemy merchant vessels, whether in or on their way to the national ports, were allowed

(*f*) The proceeds of sale were ordered to be paid over to the claimant without any deduction for costs in the proceedings, and subject only to a deduction of expenses properly incident to the custody and preservation of the property up to the time of sale

(*g*) *Infra*, p. 167.

(*h*) *The Adula*, 1 Spinks, 317).

(*i*) As to the more rigorous practice of seizing such vessels in anticipation of war, see vol. i, 338.

to depart, or to enter and depart, as the case might be, within a time fixed by proclamation, and thereafter to return unmolested to some port of their own country, subject only to their being unarmed and not having contraband on board. This exception to the ordinary rule of maritime capture was based on the ground that both good faith and mutual interest required that vessels carrying merchandise to a country for the use of the inhabitants should be protected against the surprises of war. This practice began in 1854, when, on the outbreak of the Crimean war, Great Britain and France allowed Russian merchant vessels then in British or French ports six weeks within which to load and depart, whilst vessels which had already sailed for such ports were allowed to enter and discharge their cargoes and to return unmolested to any port of their own country not under blockade; Russia making similar concessions (*j*). A policy similar in its general tenour, but varying greatly as regards time and conditions, was followed in the subsequent wars. So, in the Austro-Prussian war of 1866, Prussia conceded to enemy vessels a period of six weeks' grace. In the Franco-German war of 1870, France gave one month's grace to enemy vessels both in port or on their way to port; whilst Germany purported to grant complete immunity from capture, although this was subsequently withdrawn. In the Russo-Turkish war of 1877 Russia only granted to enemy vessels which were then in port time to unload and depart. In the Spanish-American war of 1898, the United States, as we have seen, gave one month and exempted vessels on their return voyage; but Spain gave only five days, and did not in terms prohibit capture after departure or provide for the entrance or discharge of vessels that had sailed for Spanish ports before the war (*k*). In the Russo-Japanese war of 1904, Japan gave seven days to enemy vessels already in port, and allowed vessels that had sailed prior to the 9th February to enter, unload and return, subject to the observance of certain conditions; but Russia gave only 48 hours, and did not exempt vessels on their return voyage. There was thus an inchoate usage of exemption, although it was not either sufficiently uniform or sufficiently long established to rank as an obligatory custom.

(ii) *The Hague Convention, No. 6 of 1907.* The question was considered at the Hague Conference of 1907, and after prolonged discussion an agreement was reached, which is now embodied in the Convention "relative to the status of enemy merchant ships at the outbreak of war." But the terms of this Convention—representing as they do a compromise between the conflicting views of those who asserted and those who denied the obligatory character of the usage that had recently arisen—are ambiguous and unsatisfactory, and on some points less liberal than the practice previously followed, at any rate by some States. In effect, the Convention provides as

(*j*) Turkey, also, waived her right of seizing Russian vessels in Turkish ports.

(*k*) As no captures were made by Spain, the actual intent of the Government is not clear.

follows: (1) Where a merchant ship belonging to one belligerent is in an enemy port on the outbreak of war, it is desirable that it should be allowed to depart freely, either immediately or after a sufficient term of grace, and to proceed direct, after being furnished with a passport, to its port of destination or such other port as shall be named for it. The same provision is to apply to a ship which left its last port of departure before the war, and enters the enemy port in ignorance of hostilities (*a*). (2) Where such a ship is prevented by circumstances of *force majeure* from leaving within the time provided, it is not to be confiscated, although it may be detained during the war without indemnity, or requisitioned subject to indemnity (*a*). (3) Enemy merchant ships which left their last port of departure before the war and are met with at sea whilst ignorant of hostilities, are not to be confiscated; but they may be detained subject to an obligation to restore them after the war without indemnity, or they may be requisitioned or even destroyed subject to indemnity and to the obligation of providing for the safety of the persons and the preservation of the papers on board. But after touching at a national or neutral port, and thus acquiring knowledge of the war, such vessels become subject to the ordinary law of war (*a*). (4) Enemy cargo found on any such vessels may be detained during the war without indemnity, or may be requisitioned on payment of indemnity, either in conjunction with the ship or separately (*a*). (5) Those provisions are not to apply to merchant ships whose construction indicates that they are intended to be converted into ships of war (*b*). It will be seen that Art. 1 states merely that "it is desirable" that departure should be allowed, and refers to any delay that may in fact be granted as a "term of grace;" from which it seems that the exemption cannot be demanded as of right. Hence it would still appear to be open to a belligerent, as a matter of legal right, either to detain or to require the immediate departure of enemy vessels; although under ordinary circumstances a regard for both national and neutral interests (*c*) will probably ensure both permission to leave and a reasonable period of grace. It is, no doubt, a distinct gain that such vessels are exempted from capture on the return voyage, which was not always conceded under the earlier practice; and also that vessels which of necessity overstay their time or which are met with at sea whilst unaware of the war are protected from confiscation. As regards all such vessels, however, it is expressly provided that enemy cargo found on board may be sequestrated or requisitioned, either with the

(*a*) Art. 1.
Art. 2.
Art. 3.

(*a*) Art. 4. This applies to all vessels mentioned in Arts. 1, 2, and 3; but see n. (*c*).

(*b*) Art. 5. This Convention has not been signed by forty-one Powers, by all the Powers represented at the Conference, in fact, except the United States, China, and Nicaragua, although by Germany and Russia with reservations. It has also been ratified by Great Britain. See Table, App. xiv.

(*c*) That is, as regards any neutral cargo on board.

ship or separately (*r*), although it cannot be confiscated. Germany and Russia have, indeed, made reservations with respect to those provisions which substitute sequestration for confiscation in the case of enemy vessels met with at sea in ignorance of hostilities, and enemy cargo on board (*s*); alleging that they bear hardly on States which, not having naval stations in different parts of the world, might often find it necessary to destroy such prizes and would then have to pay an indemnity. In view of these reservations, German and Russian vessels will not, even as between the signatories, be entitled to the protection accorded under these particular provisions. The exception set up as regards merchant vessels "whose construction indicates that they are intended to be converted into ships of war," is somewhat ambiguous (*t*); but in practice it would probably be applied, as in the case of *The Panama* (*u*), to any vessels susceptible of armament and capable of being used as commerce destroyers, including subsidized liners and other vessels under contract to their own Government for use in war (*x*).

(ii) EXEMPTIONS FROM MARITIME CAPTURE:

(a) COASTAL FISHING BOATS AND VESSELS ENGAGED IN SCIENTIFIC MISSIONS.

THE "PAQUETE HABANA" AND THE "LOLA."

[See vol. i., 1.]

In this case, it will be remembered, the United States Supreme Court decided that, independently of treaty and apart from comity, it was an established rule of international law that coastal fishing boats, together with their crews, cargoes and equipment, even though belonging to an enemy, should be exempt from capture, so long as they were unarmed and engaged in the pursuit of their peaceful calling. In the same case, the practice of exemption, as regards vessels employed in geographical or scientific discovery, and as regards property connected with the arts and sciences, was recognized and approved.

(*r*) Although Art. 4 does not appear to carry a right of sequestration as regards vessels mentioned in Art. 1.

(*s*) Arts. 3 and 4, par. 2.

(*t*) See p. 128, *supra*.

(*u*) See p. 166.

(*x*) On the subject generally, see Pearce Higgins, 300 *et seq.*

(b) CARTEL SHIPS.

THE "DAIFJIE."

[1800; 3 C. Rob. 139.]

Case. During war between Great Britain and Holland, two Dutch vessels were captured by the British, whilst on a voyage from the Texel to Flushing. Restitution was claimed on the ground that they were proceeding to Flushing for the purpose of taking on board some exchanged prisoners for conveyance to England, and were thus in the position of cartel ships. In the circumstances of the case, it was held that, although the vessels did not strictly come within the limits of the protection accorded to cartel ships, yet they ought to be restored.

Judgment. Sir W. Scott, in his judgment, observed, in effect, that the practice of exempting cartel ships from capture, although not ancient, was one that deserved favourable consideration, on the same grounds as all other *commercia belli*. On general principles such ships were protected both in carrying prisoners and in returning from that service. In the present case, however, the vessels were not at the time engaged in such service, and it was strictly the employment and not the future intention that carried protection. Nevertheless, such protection might, he thought, properly be extended to a case where vessels had already entered on their functions by being put into a state of actual equipment for such employment. The evidence, moreover, went to show that, notwithstanding considerable imprudence in the proceedings of these vessels, there was an honest intention to proceed to such employment; and for that reason the vessels would be restored, although subject to the payment of costs.

Appended Note. Enemy vessels actually engaged in cartel service are exempt from capture, both when carrying exchanged prisoners, when returning from such service, and—as we may gather from the decision in *The Daifjie*—even when proceeding to take

up such service, so long as that intention is clearly established (*y*). But such vessels will forfeit their privilege if they engage in mercantile traffic or otherwise abuse their position (*z*).

(c) HOSPITAL SHIPS.

THE "ARYOL."

[1905: Takahashi, International Law applied to the Russo-Japanese War, 620.]

Case.] On the outbreak of the Russo-Japanese war the "Aryol," a steamship belonging to the Russian Volunteer Fleet, was chartered by the Russian Red Cross Society for use as a hospital ship. Her intended use was officially notified to the Japanese Government, under the terms of the Hague Convention of 1899 (*a*), and a request for consequent exemption agreed to. After being equipped for that purpose at Toulon, she was attached to the second Pacific Squadron, and proceeded with that squadron on its voyage to the East. After the battle of Tsushima she was captured by a Japanese cruiser, and sent in for adjudication on the ground of having assisted in the warlike operations of the enemy. At the trial it was proved that in the course of her voyage to the East she had received on board prisoners (*b*), not being sick or wounded, for transport; that she had taken on board and carried material for military use; and that she had also discharged for the fleet services which are usually performed by a reconnoitring vessel. On these grounds both vessel and cargo were condemned.

Judgment.] In the judgment of the President and Councillors of the Sasebo Prize Court it was held that a hospital ship could only enjoy the privilege of inviolability when solely engaged in the work of relieving the sick and the wounded; and that, both by the general law and the stipulations of the Hague Convention, she became liable to capture if used for military purposes. In the present case the "Aryol," although lawfully equipped and

(*y*) But see *Le Guidon*, 5 C. Rob. at 198).

(*z*) See *The Two Ellens*, 4 C. Rob. 355; *La Rosine*, 2 C. Rob. 372.

(*a*) Now replaced by No. 10 of 1907; see Art. 2.

(*b*) In the sense, that is, of persons taken from neutral prizes.

duly notified as a hospital ship, had undoubtedly been guilty of doing acts in aid of the military operations of the enemy, and was therefore subject to confiscation according to international law.

This decision is in accordance with the stipulations of the Hague Convention, No. 3 of 1899, Art. 4, under which the signatories agree not to employ hospital ships for any military purpose; a stipulation which necessarily implies a forfeiture of the exemption accorded to such vessels by Art. 1 in the event of default (*c*). The decision is especially noteworthy in treating the carriage of prisoners (*d*) as a "military purpose" within the meaning of the Convention: a conclusion quite justifiable in the conditions of modern naval war.

General Notes. *Exceptions to the Right of Maritime Capture.* Apart from the exemptions that attach to enemy merchant vessels on the outbreak of war, which have already been considered (*e*), the chief exceptions to the ordinary right of maritime capture, resting either on custom or convention, are the following: (1) Enemy property, not being contraband, found on board neutral vessels. This is probably the most wide-reaching of the existing exemptions, and rests, as we have seen, on the Declaration of Paris, 1856 (*f*). (2) Coastal fishing vessels with their crews and apparel, as well as small vessels employed in local navigation, so long as, in either case, they are not employed for military purposes. As regards fishing vessels, this exemption, although originally a matter of treaty or comity (*g*), may probably be said to have become an obligatory custom before the end of the last century (*h*), and has now been confirmed and extended by the Hague Convention, No. 11 of 1907. This, amongst other things, provides that vessels exclusively employed in coast fisheries, as well as small boats employed in local trade, shall be exempt from capture, together with their apparel and cargo; although such exemption is to cease if they take any part in the war (*i*).

The provisions of No. 10 of 1907 are to the same effect; see ..., pp. 122, 171, n. ( ).

( ) See ..., p. 171, n. ( ).

( ) See ..., p. 166.

( ) Art. 2; see ..., p. 152.

( ) Hall, 444.

( ) See *The Peguese Fishery* ..., vol. i. 1.

See the case of *The E* ..., Takahashi, 593, a fishing vessel condemned by the Japanese Courts in 1905, on the ground that she had been engaged on police duty. By the Convention, the contracting Powers bind themselves not to take advantage of the harmless appearance of such vessels to use them for military purposes; see Art. 3. In default of observance, it would seem that the immunity in general might be revoked; see Westlake, ii. 310. The Convention has now been accepted, without reservation, by forty States, including all the great Powers, with the exception of Russia; and has also been ratified by Great Britain; see Table, Art. , No. ( ).

The distinction between coast and deep sea fishing vessels is well understood in practice, and would probably be applied in the light both of the build and habitual employment of any vessel as to which the question arose (*k*). As regards vessels employed in local trade, the exemption is clearly intended only to apply to small vessels which are on a parity with fishing boats, and would not extend to other vessels engaged in local navigation (*l*). (3) Vessels charged with religious, scientific or philanthropic missions. This exception was also founded on usage, which may be said to have become obligatory (*m*), although now confirmed by the same Convention (*n*). (4) Hospital ships. These are now exempt from capture under the provisions of the Hague Convention "for the adaptation of the principles of the Geneva Convention to maritime war," No. 10 of 1907, although subject to the conditions and limitations already referred to, including a condition that they shall not be used for military purposes (*o*). (5) Cartel ships. These are ships employed in the transport of exchanged prisoners, which are, from the very nature of their employment, treated as exempt from capture both *eundo* and *redeundo* (*p*). (6) Finally, even if the vessel herself proves to be lawful prize, it is usual, by the custom of the sea, to treat as exempt from confiscation the personal effects both of the master and crew and of any passengers that may be found on board (*q*). An immunity from seizure is sometimes claimed for vessels which have been compelled to put into an enemy port in distress, or which are disabled on the enemy coast; but such an immunity—although sometimes conceded as of grace (*r*) and although approved by the Institute of International Law so far as relates to vessels putting into an enemy port in distress (*s*)—is certainly not obligatory, and is scarcely likely to become so (*t*). Over and above these cases of complete immunity there are also certain particular restrictions on the ordinary right of capture in maritime war which claim some separate mention.

The Crews of Enemy Merchant Ships Captured by a Belligerent – Seamen engaged in the navigation of enemy merchant vessels are, as we have seen, commonly regarded as having an enemy character irrespective of their nationality (*u*). Hence on the capture of the vessel they were formerly liable to detention as prisoners of war: this being justified on the ground of their fitness for use on war vessels and transports. The capture of such persons is, however, now restricted and regulated by the Hague Convention, No. 11 of 1907 (*x*). This provides, in effect: (1) That when an enemy mer-

(*k*) See the case of *The Lee*, Takahashi, 595, a deep sea fishing vessel, condemned by the Japanese Prize Courts in 1904.

(*l*) Pearce Higgins, 103; Oppenheim, ii. 232.

(*m*) Westlake, ii. 138; Oppenheim, ii. 232.

(*n*) Art. 4.

(*o*) *Supra*, p. 172.

(*p*) *Supra*, p. 170.

(*q*) Westlake, ii. 133.

(*r*) Hallock, ii. 107.

(*s*) Westlake, ii. 140.

(*t*) Hall, 436; Oppenheim, ii. 230.

(*u*) *Supra*, p. 21.

(*x*) This has been ratified by Great Britain: see Table, App. xi.

chant ship is captured by a belligerent, such of its crew as are nationals of a neutral State shall not be made prisoners of war, and that the same rule shall also apply to the captain and officers, being neutrals, if they give a formal promise in writing not to serve on an enemy ship during the war (*y*); (2) That even where the captain, officers, and members of the crew are nationals of the enemy State they shall not be made prisoners of war, provided they undertake by formal promise in writing not to engage whilst hostilities last in any service connected with the operations of war; and (3) That the names of all persons entering into such engagements shall be notified to the other belligerent, who is forbidden knowingly to employ them during the war (*z*). But these provisions will not apply to ships that take part in hostilities (*a*).

Postal Correspondence.—Under the customary law, mail ships, whether enemy or neutral, were not exempt from the ordinary incidents of war, except by virtue of special agreement (*b*). A usage in exemption of postal correspondence was, indeed, in course of growth, although not sufficiently well-established to have become obligatory (*c*). As between the signatories to the Hague Convention, No. 11, 1907, however, special provision is now made for the protection of postal correspondence and, incidentally, the treatment of mail ships. By this Convention it is provided that the postal correspondence of neutrals or belligerents, whether official or private, which may be found on board a neutral or enemy vessel at sea, shall be inviolable. If the ship is detained, then such correspondence must be forwarded to its destination by the captor with the least possible delay; although this will not apply to correspondence which is destined to or proceeding from a blockaded port (*d*). At the same time, it is expressly provided that the inviolability of postal correspondence shall not exempt neutral mail ships in other respects from the laws and customs of war; although they are not to be searched, except when absolutely necessary, and then only with as much consideration and expedition as possible (*e*). The result is that mail ships, except where expressly exempted by treaty (*f*), still remain subject to the ordinary incidents of war. If the mail ship is an enemy vessel, she may be taken as prize, although in such case the postal correspondence is inviolable (*g*), and must be forwarded by

(*y*) Art. 5.
(*z*) Art. 7.
(*a*) Art. 8.
(*b*) *The Panama*, Takahashi, 573, 575.
(*c*) As to the course of usage in this respect, see Lawrence, War and Neutrality, 189 *et seq.* On the arrest of the German mail steamers, *Bundesrath* and *Reichstag*, in 1899 (*ib.* p. 173), the German Government warmly urged that it was highly desirable that such ships should not be stopped. In the case of *The Prinz Heinrich*, in 1904, the whole mail was seized by *The Sunda*, the mail bags for Japan being confiscated, and the rest sent on after much delay: see p. 125, *supra*.
(*d*) Art. 1.
(*e*) Art. 2.
(*f*) As to which, see vol. i. 282.
(*g*) Save in the case mentioned above.

the captor to its destination. If the mail ship is a neutral vessel, she is subject to visit and search, although search is not to be resorted to except when absolutely necessary (*b*), and must in that case be carried out with all possible consideration and promptness; whilst if the facts should justify her detention the postal correspondence must be sent on by the captor.

CAPTURE AND ITS INCIDENTS.

(i) WHAT CONSTITUTES A VALID CAPTURE.

THE "EDWARD AND MARY."

1801; 3 C. Rob. 305.]

Case. During war between Great Britain and France, the "Edward and Mary," a British merchant vessel, having become separated from her convoy during a storm, was brought up by a French privateer, and ordered to lie to until the weather had moderated. This order was complied with, but before the prize was boarded by the captors, H.M.S. "Arethusa" came in sight, and thereupon gave chase to and ultimately captured the privateer. Meanwhile the "Edward and Mary" made her escape and regained her convoy. Subsequently, a claim to salvage, as on recapture, was made by the "Arethusa." The validity of this claim depended on whether there had been an effective capture of the "Edward and Mary" by the privateer. In the result the claim was allowed on the ground that, for the purposes of capture, it was sufficient if the prize had passed under the actual control of the enemy.

Judgment.] Sir W. Scott, in his judgment, after adverting to the facts, said that he could not agree with the contention that this was not a true capture. The sending of a prize master on board was indeed a very natural overt act of possession, but it was not by any means essential to constitute a capture. As the merchant vessel was compelled to lie to and obey the direction of the French vessel and to await her further orders she was completely under

(*b*) The captor being left to judge of this.

the dominion of the enemy. There was no ability to resist and no prospect of escape. There had been many instances of capture where no one had been actually put on board the prize; as where ships had been driven on shore or into port. But as there was a doubt whether the vessel had been "retaken" within the meaning of the term used in the Act of Parliament, 33 Geo. III. c. 66, he would award salvage as for a recapture, under the general mercantile law.

As between captor and prize, a capture will be deemed complete as from the time when the former takes effective possession with intent to retain (*a*). But possession in such a case may be either actual or constructive. What usually happens is that the prize makes surrender or submission, as by striking her colours (*b*), whereupon actual possession is taken by the captor, and a prize master, whether with or without a prize crew, is put on board (*c*). But this is not indispensable. And if a vessel lies at the mercy of the captor (*d*), or if she obeys the directions and orders of the captor, this will be regarded as a constructive possession, and the capture will be effectual (*e*). The mere fact of capture does not, indeed, before condemnation, vest the property in the captor; but it confers on him, as against all other persons, a right of possession, and also imposes on him certain consequential duties and liabilities. The date of capture is important, for the reason that if condemnation should follow, its effects will relate back to that time (*f*). But if the captor loses possession or abandons the prize, then effect of the original capture will cease, and anyone who subsequently acquires possession will be treated as sole captor (*g*).

An effective capture may be either "separate" or "joint," although as regards a joint capture the onus of proof will always lie on the claimants (*h*). A capture may be "joint" either as between two or more national vessels; or as between British and allied vessels; or as between land and naval forces. In each case, moreover, a claim to "joint capture" may be established by proof either of co-operation or of association (*i*). As between two or more vessels, in order to establish a claim to joint capture by virtue of co-operation, the

(*a*) Strictly it is only then that the property becomes "prize."

(*b*) As to the effect of this, see *The Bee*, 1 C. Rob. 227.

(*c*) See *The Henrick*, 6 C. Rob. 13.

(*d*) As where the crew have been killed or have escaped.

(*e*) See *The Hunter*, 2 Dod., at p. 364; and as to constructive possession, *The Gran Cazador*, 3 Gr. L. 305. But see as to a force not known to be hostile will not have this effect: *La Esperanza*, 1 Hagg. 85.

(*f*) *The Ludwig*, v. *Morley*, 1908, A. C. 331.

(*g*) *The Atlanta*, 4 Dod., 464; Hall, 153 *et seq.*

(*h*) See *The Aid*, 1 Dods., 363, and, as to restrictions, the Naval Prize Act, 1864, s. 36.

(*i*) The *Baraba and Kitty*, Boote L. R. 1 A. & E. 195; Manual of Naval Prize Law, Arts. 252, 253.

claimant must prove that he either assisted in or contributed to the capture—although in the case of warships this will be presumed if the claimant was in sight of both captor and prize under circumstances calculated to encourage the one and intimidate the other (*k*); whilst in order to establish a like claim by virtue of association, it must be shown that the claimant, even though not present, was engaged in some joint enterprise or service under the same immediate command—as where vessels are told off to maintain a blockade, or to cruise together on some special service—and that the capture was incidental thereto (*l*). As between British and allied ships of war the same principles are applied, at any rate in a case where the adjudication falls to the British Courts. Where a joint capture of this kind has been effected, the custody of the prize will ordinarily belong to the actual captor, or, if both ships were actual captors, then to the senior commander (*m*); whilst the right of adjudication will fall to the Court of the captor having custody, with power to apportion the proceeds on the usual principles (*n*). If a joint capture is proved, the share of the claimants will in general be determined by the law of the Court of adjudication. In English law, unless otherwise provided by statute, each vessel shares in proportion to its relative strength; whilst the distribution between those on board is determined by Royal Proclamation. As between land and sea forces, in order to establish a claim to joint capture it must be shown that the claimant either rendered material assistance that contributed to the capture, or that the two forces were associated in some common enterprise of which the capture formed a part (*o*).

(ii) THE DUTY OF BRINGING IN FOR ADJUDICATION AND ITS QUALIFICATIONS.

THE "FELICITY."

[1819: 2 Dodson, Adm. Rep. 381.]

Case. During war between Great Britain and the United States, the "Felicity," an American vessel, was captured by

(*k*) *The Speedwell* (1 Dods. 359); *Le Modeste* (2 Dods. 122; Manual of Naval Prize Law, Art. 255.

(*l*) *The Nordstjern* (1 Acton, 128; *The Hurtige* (3 C. Rob. 318); *Le Guillaume Tell* (1 Edw. 6; *Le Heureux* (2 Dods. 96; Manual of Naval Prize Law, Art. 251. But this will not apply to vessels not having a military character: *The Cape of Good Hope* (2 C. Rob. 271). The principles governing the distribution of "prize bounty," as to which see the Naval Prize Act, 1864, ss. 42–44, and p. 184, *infra*, are somewhat stricter, and are directed rather to the reward of personal service than favorable situation, in virtue of which claims based on the rule of sight or mere association are for the most part rejected: see *Le Bon* (1 Dods. 42; *Le Charlotte* (1 Dods. 436).

(*m*) Manual of Naval Prize Law, Arts. 259, 260.

(*n*) Naval Prize Act, 1864, s. 35.

(*o*) *The Diligentia* (2 C. Rob. 55; *Le Bellone* (2 Dods. 345).

H.M.S. "Endymion" whilst on a voyage from Cadiz to Boston. The vessel was at the time in a leaky state, and there was considerable doubt as to whether she could be brought to a British port without assistance. The "Endymion," moreover, having been detached on special service with a view to engaging an enemy vessel of superior force, could not afford to lessen her strength by putting a prize crew on board. Hence it was determined to destroy the prize, and the crew having been transhipped, both vessel and cargo were accordingly burnt. It subsequently appeared that the "Felicity" was trading under a British license (*a*), and was therefore strictly exempt from capture; but this fact was concealed by the master until after the ship had been set on fire. More than four years afterwards a suit for damages was instituted by the owners against the captors, on the ground that the vessel was exempt from capture, and that in any case it was the duty of the captors to bring her in for adjudication, when the exemption could have been made clear. It was held, however, that in the circumstances of the case no responsibility attached to the captors.

Judgment.] Sir W. Scott, in delivering judgment, pointed out that in strictness a captor was bound, both by the law of his own country and by the general law of nations (*b*), to bring in his prize for adjudication; this in order that it might be ascertained whether it was really enemy property, and in order that mistakes might not be committed by captors in the eager pursuit of gain, by which injustice might be done to neutrals and national quarrels provoked. In the present case both vessel and cargo were clearly American, alleged by the claimants themselves to be such, and consequently enemy property at the time. This being so, no loss was incurred by the property not having been brought in for condemnation. The captors, moreover, had fully justified themselves, according to the law of their own country, for not having brought it in for adjudication, by showing that the immediate service on which they were engaged would not permit them to part with any of their crew. In this collision of duties nothing was left but to destroy the vessel; for they could not, consistently

(*a*) Granted by the British Minister at the Court of Spain in pursuance of an Order in Council of 1812.

(*b*) But see *infra*, p. 186.

with their duty to their own country, permit enemy property to sail away unmolested. Where it was doubtful whether the property was enemy property, and it was impossible to bring it in, then no such obligation arose, and the safe and proper course was to release the vessel. In fact, where the property was neutral, the act of destruction could not be justified by the gravest importance of such an act to the public service of the captor's own State: and to the neutral it could be justified, under any circumstances, only by a full restitution in value. These rules were clear in principle and well established in practice.

In the present case, however, it was contended that the hostile character was disarmed by a license; and there appeared to be no reason to dispute either the existence or authority of the license, which had indeed been granted under circumstances highly favourable to the vessel, and which still availed to protect her. These facts created a claim of a very strong character; and the only question that could arise was whether the claim was so brought forward as to affect the captor with responsibility. If the latter knew of the license, either through its production or from other circumstances which ought to have satisfied him of its existence, then he was liable for the whole loss occasioned. But if the license was not disclosed to him by those whose duty it was to inform him, and he had no sufficient means to inform himself, then he was not a wrongdoer. From the evidence in the present case it appeared that there was no such knowledge, either express or implied, on the part of the captors. The probable explanation appeared to be that the "Felicity" was in such condition that those on board her were only too glad to escape to the safety and comfort of the "Endymion": that they were kindly treated there and sent home in safety: but that, on being taken to task by their owners for their desertion of the ship and cargo, they trumped up this history of spoliation. At any rate, they held out the ship as an unprotected ship, and thereby authorized the captor to deal with her as with an enemy vessel until the destruction was beyond remedy. For these reasons the captor must be discharged from all responsibility, and the claimant condemned in costs.

In view of the concealment practised by those on board, *The Felicity* was held to be in the position of an unprotected enemy vessel. In the judgment it is laid down, alike as a rule of municipal and international law, that a captor must, in general, bring or send his prize into a suitable port for adjudication. This rule probably originated in the fact that States at one time ceded only part of the fruits of prize to the captors. But it now obtains primarily in the interest of neutrals; although it serves at the same time to ensure a regular and orderly procedure in all cases. This primary duty is, however, subject to some qualification, the scope of which—as we shall see when we come to deal more particularly with the question of the destruction of neutral prizes—varies greatly in different systems. Under the British system an enemy prize may be destroyed if the captor finds it impracticable or dangerous to send her in for adjudication, subject to the removal of the crew and the ship's papers: but if the vessel is neutral, or if there is any doubt as to her nationality, the only safe course is to release her, for the reason that if she is destroyed (*c*) the captor will, on proof of her neutral character, be liable to make full indemnity in respect both of ship and cargo (*d*). Moreover, according to the British practice, even where an enemy ship is destroyed, innocent neutral cargo on board must be paid for (*e*).

(iii) THE RESPONSIBILITIES OF CAPTORS

THE "OSTSEE."

[1856; 5 Moo. P. C. 150.]

Case. During war between Great Britain and Russia, the "Ostsee," a neutral vessel, was captured by H.M.S. "Alban" and sent in for adjudication, on a charge of having violated the blockade of Cronstadt. In the course of the proceedings, however, it appeared that Cronstadt was not at the time in question under blockade. Restitution of ship and cargo was accordingly decreed: the only other question being as to a claim for damages and costs against the captors. In the Court below this was refused: but on appeal to the Judicial Committee of the Privy Council an award of costs and damages against the captors was made, for the reasons given in the judgment.

(*c*) Which is, however, evidently contemplated as a possibility in Lord Stowell's judgment: *supra*, p. 179.

(*d*) *The Anna*, 2 Dods. 181; *The Felicity* (2 Dods. 381); *The Leucade* (Spinks, at 231).

(*e*) See the British Memorandum, Parl. Papers (1909), Misc. No. 4, p. 9.

Judgment. In the judgment of the Judicial Committee, which was delivered by the Rt. Hon. T. Pemberton Leigh, it was pointed out that in cases of restitution, three courses were open to the Court: (1) The claimants might, notwithstanding restitution, be ordered to pay the costs and expenses of the captors, as where the capture had been occasioned by the misconduct of the vessel; or (2) restitution might be granted without costs or expenses on either side, as where a vessel, with little or no fault on her part, was nevertheless involved in suspicion which entitled the captor to seize her; or (3) the captors might be ordered to pay costs and damages to the claimants, as where the vessel was not by any act of her own (*a*) open to any fair ground of suspicion, in which case the captor seized her at his peril. These principles were recognized and acted on not only in English law, but by all the chief maritime Powers.

According to the leading French, American, and English authorities it appeared that in order to exempt a captor from costs and damages in cases of restitution, there must have been some circumstances connected with ship or cargo, affording reasonable ground for the belief that one or both, or some part of the cargo, were, or might on further enquiry prove to be, lawful prize. What was reasonable cause could not be defined in exact terms. But neither in the texts nor in the cases referred to did it appear either that vexatious conduct must be proved in order to subject captors to costs and damages; or that honest mistake, even though occasioned by the act of their Government, would relieve them from their liability to make good to the neutral damage sustained by their conduct; although vexatious conduct, if proved, would be no doubt a ground for subjecting them to vindictive damages or other exceptional treatment (*b*). In the case of error occasioned by the proceedings of their own Government, the captors must be taken to act as the agents of their State, which was ultimately responsible for their action; but it was not open either to the State or to individuals to allege error as an excuse for wrongdoing. And the law of nations on these points, as shown by the decisions in the American and European

(*a*) Either voluntary or involuntary. (*b*) *The Anna*, 5 C. Rob. 373.

Courts, appeared to conform to this view (*c*). If there were exceptions to this rule they appeared to exist only in cases where the captors had been involved in nice questions as to the construction of public documents or the determination of unsettled points of law, or in cases of dispute between the belligerents themselves, where the captors had acted in unavoidable ignorance (*d*), which was not here in evidence.

Applying these principles to the facts of the case before the Court, it appeared that inasmuch as Cronstadt was not blockaded either when the "Ostsee" entered, or when she took on her cargo, or when she quitted the port, she did not fall under any one of the conditions which were required (*e*) to concur in order to justify the sending of the ship in for adjudication; and that there was, therefore, no reasonable ground for suspicion. Nor were there any irregularities on the part of the vessel of such a kind as to exempt the captors from their consequent liability to costs and damages (*f*). Nor was the case one in which the Court would be justified in making an order against the Government (*g*), for the reason that no blame appeared to be imputable to it; although it was of course open to the executive authority to grant such relief voluntarily if it was thought expedient.

An appeal had, indeed, been made to the Court to exercise its discretion in favour of the captors. But when once a case has been brought within a particular rule, it seemed that such discretion was at an end. Nor, even if the Court was at liberty to relax settled rules on its own notions of justice and policy, was it prepared to do so in the present case. The law to be applied in such cases was not confined to British captors but applied to those of all nations; and no country could be permitted to establish an exceptional rule in its own favour or in favour of any particular class of its own subjects. By the law of nations foreign decisions were entitled to the same weight as those of the country

(*c*) Reference was made to *The Charming Betsy*, 2 Cranch, 64; *The Actæon*, 2 Dods. 48; and *The* (3 C. Rob. 235).

(*d*) *The Leucade*, 1 C. Rob. 96; *The Lucy*, 6 Law. 150; *The* 2 Dods. 263; *The* 1 C. Rob. 179.

(*e*) By the instructions issued to the commanders of H. M. ships.

(*f*) Various minor points are also dealt with.

The 5 C. Rob. 152; *The* 1 Hagg. 265.

in which the Prize Tribunal sat. America had adopted almost all her principles of prize law from the English Courts; and in the latter no authorities were cited with greater respect, in cases to which they were applicable, than those of the distinguished jurists of France and America. Whatever was held in England to justify or excuse an officer of the British navy, would be held by the tribunals of any other courts to justify or excuse captors of their own nation. By the usage of all countries, captors had a great interest in increasing the number of prizes. The temptation to send in ships for adjudication was sufficiently strong. Where, therefore, a captor had, as in the present case, brought in a vessel without any ground for suspicion, and had no excuse to offer except that he had done wrong under a mistake, it was not too much to say that he must make good in temperate damages the injury which he had occasioned (*h*).

This case serves, generally, to illustrate both the responsibilities of captors and the position and functions of Prize Courts (*i*). More particularly, it enunciates some important rules with respect to the conditions under which a suspected vessel may be sent in for adjudication, and the right to compensation in cases where a capture is not upheld by the Prize Court. On the latter point, the rule is laid down that where a belligerent seizes a vessel improperly and without reasonable cause, even though in honest error either on his part or on that of his Government, the vessel not being open to suspicion through any act of her own, the captor will be responsible in damages. And this rule is now affirmed in substance by the Declaration of London (*k*). Nor, under the British practice, is any qualification of this rule admitted save in very exceptional cases (*l*). In English law it is also provided by statute that on proof of any offence having been committed by a captor, whether against the law of nations or municipal law or any regulation duly issued thereunder, the prize may, even though condemned, be reserved for the Crown instead of enuring for the benefit of the captors (*m*).

(*h*) The amount of costs and damages found to be due was ultimately paid by the British Government.

Although the latter question is reserved for after consideration: *ante*, p. 190.

(*i*) See Art. 64; *ante*, p. 185.

(*k*) See, by way of example, *The Betsey*, 1 C. Rob. 93; *The Anna*, 2 Dods. 336; and *The Maria*, 1 C. Rob. 179.

(*l*) Naval Prize Act, 1864, s. 37.

General Notes. *Who may make Captures?*- Captures on the sea can be made only by vessels duly commissioned for that purpose by the State; and such commissions can now be issued only to vessels which are under the direct control and responsibility of the State, and which also bear the outward marks attaching to the public character (*n*). For a private vessel to attack even an enemy, without a commission, is regarded by some as piratical (*o*); although others regard it as lawful so far as an enemy is concerned (*p*). Both established principles and existing analogies (*q*) sanction the view that such a proceeding would now constitute a violation of the laws of war, which would expose the offenders to punishment similar to that inflicted on unqualified combatants in land warfare (*r*). It is, however, always open to a private vessel to resist attack and to capture her assailant if she can (*s*). In English law it is also permissible for subjects, even without a commission, to seize property belonging to an enemy found in British ports or harbours (*t*); and such seizures have frequently been made, although generally only by customs officers (*u*). But in all such cases, the property seized will not enure as prize but will belong to the Crown as a *droit* of Admiralty (*v*). And the same rule applies to captures made either from the land or by a land force (*w*). Nevertheless, a non-commissioned captor is subject to the same liabilities as a regular captor (*x*).

Powers in relation to Capture.— The commissioned vessels of a belligerent are invested with a right of capture as regards all enemy vessels found on the high sea or within the territorial waters of either belligerent; and also with a right of visit and search, within the same limits, over neutral or national vessels, and a consequent right of detention on reasonable grounds of suspicion. Enemy warships are always the subject of attack, but if captured they become at once the property of the Crown and are not treated as prize; nor is their crew or cargo subject to adjudication by the Courts. Provision is, however, made by statute for enabling the Crown to grant "prize bounty" to the officers and crew of any of H.M. ships of war as are actually present at the taking or destruction of enemy warships (*y*). Enemy private vessels may be attacked if they refuse to submit after warning (*z*). And the same applies to neutral vessels which offer resistance to visit and search, or otherwise forcibly oppose the lawful exercise of belligerent rights (*a*).

Visit and Search. In exercising the right of visit and search,

(*n*) See post, p. 151; Lawrence, Principles of International Law, 3rd ed. p. 324; Westlake, International Law, II. 222; Phillimore, International Law, III. 333; Hall, International Law, 5th ed. p. 543; Spiks, Law of Nations, 2nd ed. p. 372; Twiss, Law of Nations, War, 2nd ed. p. 362; The Naval Prize Act, 1864, s. 30

the visiting ship must hoist her colours and notify the other vessel to bring to, either by hailing her or by firing two blank guns, and then, if necessary, a shot across her bows (*c*). An officer is then sent on board, who in the first instance examines the ship's papers, which generally serve to disclose the character of the vessel, cargo and voyage (*d*); but if necessary, the visiting officer may thereafter proceed to a search of both vessel and cargo, and may also make enquiry of the master and crew. Both visitation and search must be conducted in a manner as little vexatious as possible. If it appears that the vessel is not liable to detention, she is allowed to proceed on her voyage; the fact of visitation having first been entered in the log book. If, on the other hand, the vessel proves to be an enemy vessel, or if, being neutral, there is probable cause for believing that either vessel or cargo or both are liable to condemnation, then, save in the exceptional case of ransom (*e*), possession is taken by the captor. This may be done either by putting a prize master and crew on board, or by requiring the vessel to lower her flag and to steer according to orders. After taking possession, the seizure of the vessel as between captor and prize is complete, and if condemnation should ultimately follow, the divesting of the title of the original owners will relate back to the seizure (*f*).

Courses open to Captor: (i.) *Sending in for Adjudication.*—After a capture has been effected, there are in the main, and apart from certain exceptional proceedings now authorized by Convention (*g*), three courses open to the captor. In general it is, as we have seen, his duty to send the prize into a proper port for adjudication without unreasonable delay (*h*). For this purpose the ship's papers must be secured and verified, and all necessary steps taken to secure the safety of the cargo. Those on board must also be treated with humanity, and with such consideration as circumstances permit. Such of the officers and crew as may be necessary as witnesses should be sent with the vessel (*i*). The port to which the prize is sent should be a port of the captor's own or an allied country, although under special circumstances the Court will condemn a prize lying in a neutral port, and allow it to be sold there (*k*). It should also be the nearest port that is suitable for the purpose, having regard, primarily, to the exigencies of the public service, and next to the interests of all parties concerned, including both

(*c*) Manual of Naval Prize Law, Art. 200.

(*d*) This is the practice followed by Great Britain and most other maritime Powers; but some Powers, such as Germany and Denmark, require the master of the merchant vessel to proceed with the ship's papers on board the cruiser: see Hall, 731 n. 3; and, on the subject generally, Hall, 730 *et seq.*; and vol. i. 275.

(*e*) *Infra*, p. 187.

(*f*) See *Anderson* v. *Marten*, 1908, A. C. 334; and, on the subject generally, Hall, 723, and Manual of Naval Prize Law, cc. 16 and 17.

(*g*) See the Declaration of London, Arts. 14, 17; and p. 487-8, *infra*.

(*h*) *The Pearl*, 1 C. Rob. 185.

(*i*) See Manual of Naval Prize Law, Arts. 283–288.

(*k*) *The Hoffnung*, Spinks, 57. The cargo or any part of it, if not in a condition for keeping, may also be

the owners (*l*) and the captors themselves (*m*). Proper provision must also be made for the navigation of the prize (*n*). On arrival at the port of adjudication she must be delivered by the prize master into the custody of the marshal of the Court, or failing him, the principal officer of Customs (*o*), whilst the ship's papers must be handed in to the registry of the Court (*p*). Thereafter the captor must proceed to adjudication with all reasonable expedition, failing which a monition to proceed may issue against him (*q*).

ii. *Destruction.* In certain circumstances, however, the captor may destroy the prize. According to the British practice, this, as we have seen, is only permissible in the case of enemy vessels; and then only if either the vessel herself is not in a fit condition to be sent into any port for adjudication, or the captor is unable to spare a prize crew to navigate her (*r*). In either of these cases he may destroy her, after removing the crew, the ship's papers, and such of the cargo as may be practicable; these being then forwarded, together with proper attestations of the ship's character and the reasons for her destruction, to the Prize Court (*s*). But the restrictions imposed under the British practice are far from being universally recognized. The United States, during the war of 1812, adopted the policy of destroying all enemy prizes, unless there was some reason for exceptional treatment. A similar policy was followed by the Southern Confederacy during the American civil war; although in this case with the excuse that there were no neutral ports available for the reception of their prizes (*t*). And a like policy was followed by Russia in the war of 1904-5; the destruction in this case being extended to neutral prizes. In the future, moreover, the destruction of enemy vessels, and even of neutral vessels within the permissible limits, is likely to be largely resorted to by States having no home ports readily available for the reception of prizes, especially when neutral ports are closed to them (*u*). The question of the destruction of neutral prizes, or the substitution of sinking for their cargo, will be dealt with hereafter (*v*).

(*l*) The Ida, [1916] P. 214.

(*m*) The Ida, [1916] P. 214.

(*n*) Marsden, Law and Customs of Sea, 2nd ed., p. 289.

(*o*) The Ida, [1916] P. 214.

(*p*) The Ida, [1916] P. 214.

(*q*) The Ida, [1916] P. 214.

(*r*) Marsden, Law and Customs of Sea, 2nd ed., p. 289; Manual of Naval Prize Law, Art. 289.

(*s*) The Ida, [1916] P. 214.

(*t*) Moore, Digest of International Law, Vol. VII. p. 1035.

(*u*) Manual of Naval Prize Law, Arts. 302, 303.

(*v*) Post, p. 455.

(iii.) *Ransom.* In some systems it is also open to a captor to release the prize on the terms of ransom. But under the British system the granting of ransom is now prohibited except in such cases as may be specified by Order in Council (*g*). The procedure to be followed in cases where ransom is permitted has already been described (*a*). Where ransom has been granted, and the captor is himself taken before he has deposited the ransom bill and the hostage, the prize will be exonerated (*a*).

The Liabilities of Captors. The British practice with respect to the liabilities and responsibilities of captors is unmistakably severe; although often represented by foreign writers as bearing harshly on neutrals. A captor is required to exercise his belligerent rights with discretion as well as zeal, and to observe the strictest propriety of conduct towards those with whom he is brought in contact (*b*). If he detains a vessel without probable cause, he will, as we have seen, be held responsible in damages and costs, even in cases of honest mistake (*c*). Even if there was probable cause for the detention, he may, in the event of restitution being decreed, be made liable for any loss or damage arising from his default or that of his subordinates (*d*), although not for other losses (*e*). In each case the liability is that of the commander of the vessel effecting the capture, unless he acted in the matter under the express direction of a superior whose orders he was bound to obey (*f*). Even if the captured vessel should be condemned as lawful prize, the captors may be deprived of all interest therein if found guilty by the Prize Court of an offence either against the law of nations or their own municipal law (*g*). Finally, certain acts, such as not sending in all papers found on board a prize, taking money or effects from a prize before her condemnation, ill-using persons on board, breaking bulk on board with a view to embezzlement, acting in collusion with the enemy, or unlawfully agreeing to ransom a prize, are made penal by statute (*h*).

(*a*) See the Naval Prize Act, 1864, s. 45; and the Naval Prize Bill of 1910, s. 49.

(*b*) *Supra*, p. 84.

Hallleck, ii. 524; Hall, 561 *et seq.*

(*c*) Manual of Naval Prize Law, Arts. 13, 14.

(*d*) *The Ostsee*, *supra*.

(*e*) Manual of Naval Prize Law, Art. 16.

(*f*) *The Hoop*, 3 C. Rob. 129; *The Maria* and *The Diana Johanna* (4 C. Rob. 348), where the property was stolen from a warehouse in which it had been properly deposited by the captor.

(*g*) Manual of Naval Prize Law, Art. 237.

(*h*) The Naval Prize Act, 1864, s. 37. The Navy Discipline Act, 1866, ss. 38–42.

THE NATURE AND FUNCTIONS OF PRIZE COURTS.

THE "FOX."

[1811: Edwards, 311.]

Case. This was the case of an American vessel which had been taken by the British, whilst on a voyage from Boston to Cherbourg. On the part of the captors condemnation of both ship and cargo was sought, by virtue of certain Orders in Council, which had been issued by the British Government, prohibiting intercourse with France *(a)*. On behalf of the owners it was claimed that the Orders in Council had lapsed owing to the revocation by the enemy of the measures upon which they were professedly founded; and also that, even if they were still in operation, both vessel and cargo ought on grounds of equity to be exempted from their penal effect. In the result it was held that the Orders in Council were still operative; and that inasmuch as the case came within their terms both ship and cargo must be condemned.

Judgment. Sir W. Scott, in the course of his judgment, took occasion to deal with the position occupied by Prize Courts in international law. As to this he observed that the question had been raised as to what would be the duty of the Court if the Orders in Council proved to be repugnant to the law of nations. In fact, these Orders were not in the circumstances, and as measures of retaliation, to be so regarded. Nevertheless, and to correct any possible misapprehension, he desired to state it as the rule of the Court, that it was bound to administer the law of nations to the subjects of other countries in the various relations in which they might be placed towards this country and its Government. This was what other countries had a right

(a) By a decree of 1806, known as the Berlin Decree, and a further decree of 1807, known as the Milan Decree, Napoleon had declared all British Colonies under the state of blockade, and had interdicted all intercourse with them on the part of neutral States. By way of retaliation, the British Government, by Orders in Council, issued in 1807 and 1809, declared all places situated either in the territory of France or her allies or States that had submitted to her rule to be under the same restrictions as if blockaded, with all consequent penalties on intercourse.

to demand for their subjects, and to complain if they received it not. That law constituted the unwritten law of the Court: and was evidenced by the decisions, and collected from the common usage of civilized States. It was true that by the Constitution the King in Council possessed certain legislative rights over the Court, and had power to issue orders and instructions which it was bound to obey. That constituted the written law of the Court. The two propositions, that the Court was bound to administer the law of nations, and that it was bound to enforce the King's Orders in Council, were not inconsistent with each other, for the reason that such orders and instructions were presumed to conform under the given circumstances, and as experience showed generally did conform, to the principles of the unwritten law. They were either directory applications of those principles or positive regulations consistent with them, but prescribing their more particular application. As to any possible conflict, in the event of such directions and regulations contravening the law of nations, it would be indecorous to presume that such an emergency would arise. With respect to the orders and instructions then in question, these, as measures of retaliation, appeared to be justifiable under the law of nations. They must, moreover, be regarded as still operative, on the ground that the measures of the French Government on which they were founded were still unrevoked. Nor were there any circumstances in the present case, arising out of the conduct of the British Government, on which any equitable claim could be founded.

According to the view taken in the judgment, the Orders in Council issued by the British Government (*b*) were held to be justified as measures of retaliation. In principle, of course, a wrong done to neutrals by one belligerent cannot justify the commission of a similar wrong by the other; but the reasoning appears to be that if neutral States acquiesce in or fail to take active steps to redress an undue extension of belligerent right on the part of one of the States at war, which not only prejudices neutrals but also places the other belligerent at grave disadvantage, then the latter has no alternative but to resort to measures of retaliation (*c*).

(*b*) *Supra*, p. 188, n. (*a*).

(*c*) As a matter of fact, these measures were the subject of active protest and even retaliation by the United States, whilst the British Orders formed one of the causes which led to the war of 1812: see Moore Digest, vii. 798 *et seq.*

The part of the judgment, however, which most concerns us here, is that which relates to the international character and functions of Courts of Prize. Such Courts, it was said in effect, are, from the very nature of the questions with which they deal, bound to administer a common law of nations; and this with a due regard to the rights of all, irrespective of nationality. And the same view has been frequently asserted in other cases. So, in *The Maria* (1 C. Rob. at 350), the same learned judge remarked that it was his duty, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, whether neutral or belligerent; and to make no pretension on the part of one belligerent which would not be conceded to the other in the like circumstances (*d*). In *The Fox*, the question of what the duty of the Court would be, in the event of the municipal law contravening the law of nations, is indeed dismissed, on the assumption that such a conflict was not likely to occur. But in English law such Courts, even though they will always seek to put such a construction on the municipal law or regulations made thereunder as will bring them into harmony with the law of nations, would, in the last resort, and notwithstanding some dicta to the contrary that are to be found in the cases (*e*), undoubtedly be bound by the clearly expressed will of Parliament, as the sovereign authority (*f*). And the same would also apply in other systems.

Great Britain, unlike some other maritime Powers, has no official Code of Prize Law or Naval War Code (*g*). The prize system depends in the main on the Naval Prize Act, 1864 (*h*), the Prize Courts Act, 1894 (*i*), and various Orders in Council issued thereunder: whilst for the rest the law applied is judiciary law, which purports to be based on and to conform to the law of nations.

With respect to the constitution and jurisdiction of Prize Courts, the High Court of Admiralty (*k*) is invested with a general jurisdiction in cases of prize, which is exerciseable either in the first instance or by way of appeal from other Courts. As regards British dominions and dependencies, it was formerly the practice, on the outbreak of war, to issue commissions to Courts of Vice-Admiralty

(*d*) See also *The Recovery*, 6 C. Rob. 341; *The Ostsee*, p. 182, *supra*.

(*e*) See *The Maria*, 1 C. Rob. at 350; *The Fox*, Dav. at 112; *The Recovery*, 6 C. Rob. at 348, 349; and, as regards other Courts, *The Zamora*, [1916] 2 A. C. 77, 89; *Re Piracy Jure Gentium*, [1934] A. C. 586.

(*f*) See *Lee v. Bude & Torrington Junction Ry. Co.*, L. R. 6 C. P. 582; and *Ex parte Marais*, [1902] A. C. 109.

(*g*) The Manual of Naval Prize Law, issued in 1888, although published under the direction of the Admiralty, has never been officially disputed, denied to have an official authority, and has since been withdrawn, although it has still an evidentiary value. As to the need of such a code, see Holland, Letters on War and Neutrality, 29 *et seq.*

(*h*) 27 & 28 Vict. c. 25.

(*i*) 57 & 58 Vict. c. 39. There are also other statutes, such as the Naval Discipline Act, 1866, and the Admiralty Court Act, 1861, which touch on questions of prize.

(*k*) Now the P. D. and A. Div. of the High Court.

established there, authorizing them to deal with matters of prize. But such commissions may now be issued in time of peace, although they take effect only on the issue of a proclamation by the Crown on the outbreak of war (*l*). They may now be issued either to Vice-Admiralty Courts as of old (*m*), or to Colonial Courts of Admiralty (*n*); with a right of appeal in either case to the High Court of Admiralty. There is a further appeal from the High Court itself to the Judicial Committee of the Privy Council; such appeal being as of right in cases of final decree, and by leave of the Court in other cases (*o*). The High Court is empowered to enforce any decrees or orders either of the lower Courts or of the Judicial Committee in prize cases; whilst the lower Courts are also required to enforce all orders and decrees of the higher Courts (*p*). The procedure in prize cases is regulated in part by the Naval Prize Act, 1864 (*q*), and in part by general orders and rules issued either under that Act (*r*) or the Prize Courts Act, 1894 (*s*).

General Notes. *The Nature and Functions of Prize Courts.*—All maritime captures must now be adjudicated on by a competent Court, and for this purpose Prize Courts are established in each of the belligerent States. The functions of such Courts are, shortly, to enquire into cases of maritime capture, to decree condemnation where the property captured proves to be lawful prize; to award restitution where it is not, with such compensation as may appear just; and incidentally to protect the interest of all against rapine and disorder. They occupy an important place in the international system, for the reason that they have to pass upon the interests both of belligerents and neutrals, and that the value of such interests is often large, whilst, so far, there has been no appeal to any external tribunal. The constitution of such Courts is solely a question of municipal law, and varies greatly in different systems. In Great Britain and the United States they are always presided over by judges having judicial training; but in other countries they often comprise or are even composed of officials, and are, indeed, sometimes rather in the nature of administrative than legal tribunals, whilst similar differences prevail with respect to procedure (*t*). It is now proposed to supplement this organization by the establishment of an International Prize Court (*u*).

(*l*) 57 & 58 Vict. c. 39, s. 2.

(*m*) These being Imperial Courts: see the Vice-Admiralty Courts Acts, 1863 and 1867.

(*n*) These being Colonial Courts invested with Admiralty jurisdiction: see the Colonial Courts of Admiralty Act, 1890, s. 3.

(*o*) 27 & 28 Vict. c. 25, s. 5.

(*p*) *1857*, ss. 4, 9.

(*q*) Sects. 16 *et seq.*

(*r*) Sect. 13.

(*s*) Sects. 3, 4.

(*t*) As to the American prize system, see the American and English Encycl. of Law, i. 666–668; as to the Japanese system, Takahashi, 528; and as to other systems, Phill. iii. 658 *et seq.*

(*u*) *I. c.* p. 194.

Their Status in International Law. Such Courts are sometimes said to possess an international character. And this is true to the extent that they are open to all persons, whatever their nationality, whose interests are legally at stake (*a*); that they are bound to act as between nationals and non-nationals with strict impartiality; that they are presumed to administer rules that conform to the law of nations in so far as this is ascertained; and that the State in which they sit is internationally responsible if they fail to do so. Nevertheless, such Courts are at bottom only national Courts, for the reason that they are established and regulated by the sovereign authority of the country in which they sit, and must ultimately take their law from it, even though that law may not conform to the law of nations (*b*). Nor is this greatly affected in practice by the fact that the State is responsible for their decisions. As between the belligerents themselves, the ultimate legal sanction has already been resorted to; whilst, as between belligerents and neutrals, the lack of uniformity and certainty in international usage generally renders it difficult to prove an unequivocal wrong; and, although the desire to conciliate neutral opinion and the danger of antagonizing the growing naval power of neutrals may occasionally lead to some concessions, yet these are in their nature political rather than legal. The establishment of an International Prize Court would, however, in some measure, and so far as its appellate jurisdiction extends (*c*), serve to remove this difficulty.

The legal Situation of the Court. It is now universally agreed that a Prize Court cannot be lawfully established by a belligerent in neutral territory (*b*). In principle, however, it would seem that such a Court may rightly be established in the territory of an ally or co-belligerent; or even that the Courts of the latter may themselves be resorted to (*c*). But a neutral Court is not at liberty to exercise jurisdiction in matters of prize, except where the prize, being within its jurisdiction, is shown to have been taken in violation of the neutrality of the territorial Power (*d*), or where the prize was abandoned by the captor and is the subject of a salvage claim on the part of neutrals (*e*).

The legal Situation of the Prize. With respect to the legal situation of the prize itself, according to the British and American practice, it is competent to a Prize Court to act on property lying within neutral ports, so long as it remains under the control of the captor

(*a*) As to enemy interests, see pp. 195, 196, *infra*.

(*b*) Although they will, perhaps, even more than other Courts seek to put such a construction on municipal rules as will bring them into conformity with the admitted usage of nations: see vol. i. 22; and generally, Oppenheim, ii. 175, n.; Holland, Studies, 199.

(*c*) See H. C., No. 12 of 1907, Art. 2; and p. 195, *infra*.

(*d*) See H. C., No. 13 of 1907, Art. 4.

(*e*) Although this would in strictness have the disadvantage of rendering the captor State responsible for the decisions of the Courts of another Power; see Taylor, 581.

(*d*) *The Gran Para*, 7 Wheat. 471

(*e*) *The Mary Ford*, 3 Dall. 188

and is not in process of adjudication elsewhere (*f*); and the correctness of this view appears to be impliedly affirmed by the provisions of the Hague Convention, No. 13 of 1907 (*g*). Moreover, when jurisdiction in a matter of prize has once attached it will continue notwithstanding that the prize property has been landed (*h*) or sold by the captors (*i*), or has been lost or destroyed (*k*).

Responsibility for Decree.—It is commonly recognized that the decision of a competent Court on a question of prize is final and conclusive in law (*l*). It settles all questions of right or title as regards the property taken, and precludes any further controversy as to the validity of the capture as between the original owners and the captors or those who claim under them, in whatever country the property may afterwards be found (*m*). To hold otherwise would lead to endless disputes and uncertainty in the matter of titles (*n*). Nevertheless, the State to which the Court belongs remains internationally responsible for its decisions; and it will be open to neutral States, whose interests or the interests of whose subjects are affected, to question their correctness, and to make such reclamation thereon as may be thought fit (*o*). In the first instance, such claims are usually prosecuted diplomatically, but in the last resort they may be enforced by means of reprisals (*p*), or even by intervention (*q*). Such claims, if apparently well founded, are often referred for decision to a joint commission, or some other arbitral body. So, in 1794 a joint commission was appointed by Great Britain and the United States to adjudicate on the alleged unlawful capture and condemnation of certain American vessels during the Revolutionary war (*r*); whilst in 1871 a similar commission was appointed for the purpose of adjudicating on a number of claims arising out of the alleged unlawful condemnation of British vessels by the American Prize Courts during the Civil war (*s*). But such proceedings will not strictly affect any right or title acquired under the decision complained of.

(*f*) *The Santissima Trinidad* (7 Wheat. at 355); *The Pomona* (1 Dods. 25).

(*g*) Art. 23.

(*h*) *Hudson* v. *Guestier* (4 Cranch. 293).

(*i*) *The Johan* (6 C. Rob. 194).

(*k*) *The Susanna* (6 C. Rob. 48); and see also Halleck, ii. 429 *et seq.*

(*l*) Save, of course, for such right of appeal as may be allowed by the domestic law.

(*m*) See Halleck, ii. 407, and authorities there cited, n. 1. But in English law the decision of a foreign Prize Court may be examined in order to see if the facts in proof of which the decision is adduced were actually so found by the foreign Court: *Dias* v. *Glover* (2 Sm. L. C. 634); *Lothian* v. *Henderson* (3 B. & P. 545); *Castrique* v. *Imrie* (L. R. 4 H. L. at 434).

(*n*) See, in English law, *The Countess of Lauderdale* (4 C. Rob. 283).

(*o*) *Infra*, p. 232; and, as to claims in respect of enemy property, p. 195.

(*p*) As in the case of the Silesian loan: see vol. i. 334.

(*q*) As occurred in 1879, when Germany intervened to secure the release of a German vessel condemned by a Peruvian Court during war between Chile and Peru: see Oppenheim, ii. 507.

(*r*) See Taylor, 583.

(*s*) See *The Springbok* Moore, Int Arb., iv. 3928); *The Sir William Peel*, iv. 3935); and *The Lucia*, iii. 2838). As to similar claims made during the Russo-Japanese war, see p. 437-8, *infra*.

The International Prize Court: (i.) *Why needed?*—The present system of dealing with cases of prize is open to various objections. In the first place, it constitutes the State of the captor, in some sort, a judge in its own cause; and although the British, American, and French Courts have, on the whole, exhibited a commendable impartiality (*t*), yet, in general, there is probably bound to be some leaning in favour of the national interests, especially in countries where the Court consists of or comprises administrative officials (*u*). Next, although such Courts purport to administer a law in conformity with the law of nations, they are, in fact, bound to take their law, whatever it may be, from the sovereign authority of the State in which they act (*x*). Finally, and apart from any positive regulation, such Courts will necessarily follow the practice of their own State in cases where the practice of nations conflicts. Long prior to 1907 various proposals had been made for the formation of an International Court (*y*). In 1887 the Institute of International Law included a project of this kind in its suggested code for the regulation of maritime captures (*z*). But these projects, although not without their influence on international opinion, were not attended by any immediate result. In 1907 the subject came under consideration at the Hague Conference (*a*); with the result that after prolonged discussion and negotiation a draft project was agreed on, which is now embodied in the Prize Court Convention, No. 12 of 1907. In view, however, of the great divergence of opinion and practice which then prevailed on subjects with which the proposed Court would have to deal, many States, including Great Britain, were unwilling to accept the Convention until the law on these subjects had been better ascertained and defined. This, indeed, was the main object of the holding of the Naval Conference of 1908-9, which resulted in the framing of the Declaration of London. Meanwhile the Prize Court Convention, although originally signed by some 38 States (*b*), including all the Great Powers, has not, so far, been ratified by any. Nevertheless it claims some consideration, as embodying a project which, in some form or other, is likely at no distant time to become a reality.

(ii.) *The Hague Convention "relative to the Establishment of an International Prize Court."* This Convention provides for the

(*t*) As to the British Courts, it has been computed that two out of every five of Lord Stowell's decisions, numbering some 150, were given in favour of neutrals. As to the law, see pp. 187, 190, *ante*. The attitude of the American Courts has been very similar, save perhaps during a period of the civil war, when they exhibited—as has since indeed been admitted by one of their judges an unmistakable bias against Great Britain: see Hall, 668.

(*u*) *Supra*, p. 191.

(*x*) *Supra*, pp. 190, 192.

(*y*) One of these dates back as early as 1759. For an account of these, see Ortolan, ii. 559 *et seq.*

(*z*) *Ibid.*; Barclay, Problems, 105.

(*a*) Proposals on the subject were submitted both by Great Britain and Germany; for an account of these and the mode in which they were dealt with, see Pearce Higgins, 432 *et seq.*

(*b*) Of these, however, no less than ten signed under reservation of Art. 15, which deals with the constitution of the Court.

establishment of an International Court, having the constitution, and exercising the jurisdiction and functions, described below. The Court is to hear appeals from national Prize Courts, although only in the cases prescribed; and is empowered to order restitution and to assess damages and award compensation. But the Convention will only apply, as of right, when all of the Powers at war are parties thereto (*c*). It is to come into force six months after being ratified by a sufficient number of Powers to enable the Court to be duly constituted (*d*); and is to remain binding for twelve years from the time of coming into force. It is, moreover, to be deemed to be tacitly renewed as between the contracting Powers for successive periods of six years, unless denounced on the expiration of any of these periods, in which case it will cease to bind the Power that has denounced it but will otherwise continue operative (*e*). A demand for its revision may, however, be made by any contracting Power two years before the expiry of any of the periods aforesaid (*f*). At the Naval Conference, with the object of meeting the difficulties experienced by certain Powers, such as the United States, whose domestic constitution did not allow of an appeal from their highest Courts to any external tribunal, a protocol was agreed on to the effect that such States might ratify the Convention subject to a reservation substituting a direct claim for compensation for proceedings by way of appeal, so long as the rights secured by the Convention were not thereby impaired; the result being that in such cases the International Court would, if it disagreed with the decision of the national Court, award compensation, although without technically overriding the decision in question (*g*).

(iii.) *The Jurisdiction of the International Prize Court.*—Under the Convention, jurisdiction in matters of prize is to be exercised in the first instance by the Prize Courts of the captor, the judgments of which must be publicly pronounced or officially notified to the parties (*h*). From these an appeal, or what is virtually an appeal, may be made to the International Prize Court in certain cases set forth in the Convention. These comprise cases (1) where the judgment of the national Court affects the property of a neutral Power or individual; and (2) where the judgment affects even enemy property, but relates to (a) cargo found on board a neutral ship (*i*), or (b) an enemy ship which is alleged to have been captured in the territorial waters of a neutral Power which has not made the capture the subject of a diplomatic claim (*k*); although the appeal in this

(*c*) Art. 51.

(*d*) Arts. 15, 52–54.

(*e*) Art. 55; assuming, that is, that sufficient adherents remain.

(*f*) Art. 57.

(*g*) This is dated the 17th Sept., 1919; and new forms are additional Protocol to the Prize Court Convention, No. 12 of 1907.

(*h*) Arts. 1, 2.

(*i*) And which would, therefore, ordinarily be protected by the neutral flag.

(*k*) See H. C., No. 13 of 1907, Art. 3; p. 193, *ante*.

case must be by the neutral Power (*l*); or (c) enemy property which is alleged to have been captured in violation of some convention subsisting between the belligerent Powers or some enactment of the State of the captor. The appeal may be based on alleged error either in fact or in law (*m*). But when the national Court has set aside a capture, then an appeal to the International Court will only lie on the question of damages (*n*): with the result that there is no appeal to the International Court against a decree of restitution. The contracting Powers bind themselves expressly to accept the decrees of the International Court, and to carry them out with the least possible delay (*o*).

(iv.) *By whom Proceedings may be instituted?*—An appeal to the International Court may be made either (1) by a neutral State, if the judgment of the national Prize Court injuriously affects either its property or that of its nationals, or if the capture is alleged to have been made in its territorial waters; or (2) by a neutral individual, if such judgment injuriously affects his property, subject, however, to the right of his own State either to forbid the appeal or to undertake it in his place; or (3) by an enemy individual, if such judgment injuriously affects his property, and if either the capture was made on a neutral vessel (*p*) or is alleged to have been in violation of some convention or belligerent enactment as before described (*q*), although if a violation of neutral waters is involved only the neutral State can appeal (*r*). The same rights also attach to successors in title if they have taken part in the proceedings in the national Court (*s*). Such an appeal may be made either from the national Court of first instance, or, after one domestic appeal, as the law of the captor may provide; whilst, if no decision is given within two years, then the case may be taken direct to the International Court without any prior decision (*t*).

(v.) *The Law to be applied.*—The International Court, in cases coming before it, is to apply, first, the provisions of any treaty which may be in force between the parties relevant to the matter in question; next, such rules of international law as are generally recognized and applicable to the matter in question; and, finally, and in default of any such recognized rule, "the general principles of justice and equity." Where the appeal is based on the violation of some enactment of the belligerent captor then such enactment is to be applied. The Court may disregard any failure to comply with rules of procedure prescribed by the law of the captor if it regards them as unjust or inequitable in their effects (*u*). If the Court upholds a capture, the proceeds are then distributable ac-

(*l*) The enemy owner, as such, having no claim to restitution.
(*m*) Art. 3.
(*n*) Art. 8.
(*o*) Art. 9.
(*p*) *Supra*, p. 195.
(*q*) *Supra*.
(*r*) Art. 4.
(*s*) Art. 5.
(*t*) Art. 6.
(*u*) Art. 7.

cording to the law of the captor. If it finds the capture to have been invalid, then it decrees restitution and fixes the amount of damages, if any; whilst if the prize has been sold or destroyed, it determines the amount of compensation to be paid to the owners (*x*). The provision that, in default of a generally recognized rule, the Court shall apply "the general principles of justice and equity" probably means that the judges composing the Court would apply the principles of the system with which they were most familiar (*y*); but the Declaration of London, 1909, if it should be accepted, will serve largely to mitigate this defect.

(vi.) *The Constitution of the Court.*- The Prize Court itself is to consist of fifteen judges, of whom nine will constitute a quorum (*z*); and all of whom are required to be skilled in international maritime law and of high reputation (*a*). For the purpose of constituting it, each of the signatory Powers is to appoint a judge and a deputy judge (*b*). Both judges and deputy judges are to be appointed for a period of six years; and, in case of death or resignation, a new appointment is to be made for a fresh period of six years (*c*). From the body of judges so nominated the Court itself is to be constituted on the following plan: The judges appointed by Great Britain, the United States, France, Germany, Austria-Hungary, Italy, Russia and Japan, making eight in all, are to be permanent members of the Court; whilst the remaining seven places are to be filled by judges appointed by the other signatory Powers sitting by rota, according to a Table annexed to the Convention (*d*), the place of an absent judge being always taken by his deputy (*e*). The only modification of this is that, if in time of war it should happen that either of the belligerents has no judge at the time entitled to sit in the Court, then the belligerent in question may claim to have a judge of its own appointed for the purpose of taking part in all cases arising out of the war, one of the judges ordinarily entitled to sit being withdrawn (*f*). No person can sit as judge who has taken part in the proceedings before the national Prize Court (*g*). Provision is also made for the appointment by a belligerent captor, or by a neutral State that may be involved in the proceedings, of a naval officer of high rank to act as assessor, although without any voice in the decision (*h*). The judges are to be paid out of a common fund, and may not receive any further

(*x*) Art. 8.

(*y*) Which, in view of the constitution of the Court, might possibly operate to the prejudice of the Anglo-American rules and practice.

(*z*) Art. 14.

(*a*) Art. 10.

(*b*) Art. 10.

(*c*) See Art. 11; and, as to the rank and precedence, Art. 12; and, as to the oath of office and privileges and immunities, Art. 13.

(*d*) See Art. 15; and as to the case of any of these Powers not being parties to the Convention, Art. 56.

(*e*) Art. 14.

(*f*) This being determined by lot; Art. 16.

(*g*) Art. 17.

(*h*) Art. 18.

remuneration from their own Government (*i*). The Court is to sit at the Hague, and cannot in general sit elsewhere without the consent of the belligerents (*k*). The ministerial functions of the Court are to be served by the Administrative Council and the International Bureau (*l*). The Court is to decide what languages may be used, but the official language of the national Court from which the case comes may always be used (*m*). The clauses dealing with the constitution of the Court gave rise to great dissatisfaction on the part of the smaller States; and in this matter no less than ten of the signatories have made reservations. Provision has, however, been made for a possible revisal of the present constitution under certain conditions (*n*). The equal treatment of all States outside the range of the great Powers—notwithstanding much disparity of position as regards mercantile marine, naval forces, and sea-borne trade—involves, no doubt, a certain inequality of consideration; but as against this it must be borne in mind that every State is secured representation when at war, and that the large number of countries from which the judges are drawn serves to ensure that all juristic systems shall be duly represented (*o*).

(vii.) *Procedure.*—The Convention makes provision for the appointment of agents and advocates (*p*); and for the service of notices, the procuring of evidence and the execution of requests for this purpose, within the territory of any States that are parties to the Convention (*q*). It also embodies a code of procedure (*r*); and incidentally empowers the Court to make any further and necessary rules (*s*), and to suggest modifications of the rules already embodied in the Convention (*t*). In dealing with cases before it, the Court may take additional evidence (*u*). Its proceedings must in general be public (*v*); all questions are to be decided by a majority of the judges present (*y*); whilst its judgments must be delivered in open Court, and must state the reasons on which they are based (*z*). The code also makes due provision with respect to the awarding of costs (*a*). The general expenses of the Court are to be borne by the contracting Powers in proportion to their representation on the Court (*b*).

(*i*) Art. 20.
(*k*) Art. 21.
(*l*) Arts. 22, 23; and see vol. i. 35.
(*m*) Art. 24.
(*n*) Art. 57.
(*o*) See Pearce Higgins, 440; and for a short survey of the merits and demerits of the proposed Court, Smith, International Law, 368 *et seq.*
(*p*) Arts. 25, 26.
(*q*) Art. 27.
(*r*) Part III.
(*s*) Art. 49.
(*t*) Art. 50.
(*u*) Art. 36.
(*v*) Art. 39.
(*y*) Art. 43.
(*z*) Arts. 44, 45.
(*a*) Art. 46.
(*b*) Art. 47.

PRIZE AND BOOTY.

(i) TITLE PRIMARILY IN STATE.

THE "ELSEBE."

[1804; 5 C. Rob. 173.]

Case. During war between Great Britain and France, in which Sweden was neutral, the "Elsebe," a Swedish vessel, was, with several other vessels, captured by the British whilst under the convoy of a Swedish warship, and was subsequently proceeded against, together with her cargo, on the ground of resistance to visit and search. Various questions arose in the course of the case (*a*); but the main question was as to the nature of "prize" and the respective rights of the Crown and captors therein. This arose through the act of the Crown in releasing several of the vessels, including the "Elsebe," prior to adjudication and without the consent of the captors. The Crown's right to do so was questioned by the captors on the ground that an interest in the vessels captured had already become vested in them at the time of seizure, under the grant of prize; and that this could not be displaced by any after act of the Crown. This question was raised on a motion to proceed to adjudication, notwithstanding the release and discharge of the vessel by order of the Crown. In the result it was held that inasmuch as a captor's right to prize was wholly derived from the Crown, it was quite open to the latter to order the release of a captured vessel prior to adjudication, and this without any consent on the part of the captors.

Judgment. In delivering judgment, Sir W. Scott found that the Crown had in fact released the vessel, and that this release had been duly accepted by the owners. On the question of right, the learned Judge observed that it was admitted that the claim of the captors rested wholly on the Order in Council, the Proclama-

(*a*) Especially as to the liability of cargo owned by neutrals, as to which it was contended that neutral interests were not affected by reason of the resistance of the convoy; and also that a grant or prize by the Crown did not, in the circumstances, extend to neutral property, both of which contentions were ultimately overruled by the Court.

tion, and the Prize Act; and it was not denied that, independently of those instruments, the whole subject-matter was in the hands of the Crown, as well in point of interest as of authority. Prize was, in fact, altogether a creature of the Crown. No one had or could have any interest save through the Crown, to whom belonged at once the power of making war and peace, all acquisitions that might be made during war, and the disposal of such acquisitions, which might in itself be of the utmost importance for the purposes of war and peace. This was not a peculiar doctrine of the British Constitution, but was universally received as a necessary principle of public jurisprudence. Its object was that the Power having authority to decide on peace or war might use it in the most beneficial manner for the purposes of both. In view of this it must be regarded as a general presumption that no Government meant to divest itself of this attribute of sovereignty, unless it did so by clear and unequivocal expression. In English law, moreover, a grant from the Crown was presumed to pass no more than was clearly expressed. Applying these principles to the case before the Court, he found that neither by the Order in Council, nor by the Proclamation, nor by the Prize Act, was any interest conferred on the captors which derogated in any way from the primary right of the Crown: that the only right conferred on captors was, in fact, a right to seize and bring in certain property; that their interest in the prize vested only after condemnation: and that prior to such time the Crown could dispose of the property therein as it might think fit. In practice, moreover, such a right had been exercised by the Crown, without being questioned, in a large number of instances. It was also a frequent practice in articles of peace to stipulate for the restitution of all property captured after the dates fixed for the cessation of hostilities in different latitudes; this being a stipulation which the Crown would be powerless to give effect to without some such power as that now contended for. Nor did the exercise of such a power involve any injustice to the captors in the matter of costs and damages, for the reason that the acceptance of a release by the owners of the captured property operated as a waiver of any rights in this respect which they might otherwise have.

Technically, and for the purposes of Admiralty jurisdiction in English law, "prize" extends to all property, whether in ships, goods, or other articles, captured *jure belli* on the sea or in foreign ports or harbours; or captured on land by naval forces acting either alone or jointly with land forces; or captured in the rivers, ports or harbours of the captor's country; as well as money received by way of ransom (*b*). "Booty," on the other hand, consists of property captured on land otherwise than by naval forces (*c*).

With respect to "prize," under the British system all such property vests in the Crown, as representing the State, the captor having no title to or interest therein except such as may be conferred by the Crown (*d*). At the same time, it is usual, by Royal proclamation issued at the commencement of a war, to award to captors the proceeds of all "prize" taken, subject to an adjudication of the Court: the mode of distribution being regulated by another proclamation (*e*). Armed vessels of the enemy do not, however, constitute "prize," and are not subject to adjudication; although the Naval Prize Act, 1864, makes provision for an award of "prize bounty" for the capture or destruction of such vessels (*f*). The same Act also provides for the award of "prize salvage" in respect of British vessels previously taken by the enemy and subsequently recaptured (*g*). The same principle, so far as relates to the vesting of prize property in the State, also obtains under the law of the United States (*h*).

With respect to booty of war, in English law the title to booty equally with prize vests primarily in the Crown (*i*); whilst, like prize, it is usually distributed amongst the forces engaged, a practice now contemplated and sanctioned by statute (*k*). By 3 & 4 Vict. c. 65, moreover, the Court of Admiralty is empowered to exercise jurisdiction in all questions of booty of war or its distribution that may be referred to it by the Crown, and is required to proceed therein as in cases of prize (*l*).

(*a*) See *The Two Friends* (1 C. Rob. 271; *Linda* v. *Rodney* (2 Doug. 613, n.); *The Ships taken at Grotoe* (4 C. Rob. 388).

(*b*) In so far, of course, as such property is legally susceptible of appropriation: *supra*, p. 60.

(*d*) See the Naval Prize Act, 1864, s. 55.

(*e*) See Manual of Naval Prize Law, p. 142.

(*f*) Ss. 42–44, and p. 184, *supra*.

(*g*) Ss. 10, 11.

(*h*) See *Commodore Stewart's case* (1 C. C. 43; Scott, 910); and, as to the American Prize system generally, Halleck, ii. 367.

(*i*) *Alexander* v. *The Duke of Wellington* (2 Russ. & My. 35).

(*k*) See the Army Prize Money Act, 1832, as amended in certain particulars by 29 & 30 Vict. c. 47, and also 57 & 58 Vict. c. 39.

(*l*) This does not mean that the same principles of distribution are necessarily to be followed, although the rules applied are in fact largely based on those of prize: see the case of *The Banda and Kirwee Booty* (L. R. 1 A. & E. 109).

(ii) DIVESTMENT OF TITLE OF ORIGINAL OWNER

ANDERSEN *v.* MARTEN.

[1908: A. C. 334.]

Case.] This was an action on a policy of insurance underwritten by the defendant, by which certain interests in the S.S. "Romulus," a German vessel, belonging to the plaintiff, were insured for twelve months as from the 12th January, 1905 (*a*). The risks insured against included only loss by the perils of the sea, and did not cover loss by capture. During the continuance of the policy, the "Romulus" sailed with a cargo of coal for Vladivostock, a naval port and base of operations in the war then proceeding between Russia and Japan: coal having at the time also been proclaimed as contraband of war. In order to avoid the Japanese cruisers the vessel took a northern course, and sustained such injury by contact with the ice that the master found it necessary to make for Hakodate, a Japanese port. On the 26th February, when a short distance from Hakodate, the "Romulus" was seized by a Japanese cruiser, on the ground of carrying contraband, and ordered to proceed to Yokosuka under the charge of a Japanese officer. On her voyage to Yokosuka, she sustained further injury by the perils of the sea: and on the 27th February she was run ashore and became a total loss. On the 16th May, 1905, after her loss, the Japanese Prize Court condemned both ship and cargo, on the ground that she had been employed in transporting contraband of war by fraud: it being also found that her papers had been falsified. In the circumstances the plaintiff claimed to recover as for a total loss by the perils of the seas. In aid of this it was contended that the ship being a neutral vessel, the plaintiff, as owner, did not by the mere fact of seizure on the 26th February lose either property or possession in the vessel, for the reason that the Prize Court, even though condemning the cargo, might nevertheless have released the vessel: that the plaintiff must therefore be deemed to have retained his interest

(*a*) The insurance was expressed to be on disbursements, but at the trial it was agreed that the rights of the parties should be determined as though the policy had been on the ship.

until divested by an actual adjudication: and that such interest had in fact been lost by the perils of the sea within the meaning of the policy. On behalf of the defendant, it was contended that there had been an actual decree of condemnation which vested the prize in the captor; that, according to the principles followed by the English Courts, this related back to the original seizure; and that the vessel was therefore lost by capture, which was expressly excepted from the risks insured against; the loss by the perils of the seas having occurred after the capture and whilst the vessel was in the hands of the captor. In the result, it was held by the House of Lords, affirming the decision of the Court of Appeal, that there was in fact a total loss by capture, and that the owner could not recover on the policy.

Judgment. In delivering judgment, Lord Loreburn, L.C., after referring to the facts and to the arguments adduced on behalf of the plaintiff, pointed out that enemy vessels did in some respects stand on a different footing from neutral vessels under the laws of prize. Carriage of contraband to a belligerent port did not itself impart an enemy character to a neutral ship. Such a vessel could not lawfully be destroyed (*b*); nor could her crew be treated as prisoners of war. The carriage of contraband was not unlawful in the same sense as aiding an enemy in an expedition. It was an adventure which the offended belligerent might, if he could, visit with capture and condemnation by a Court of Prize. Hence it appeared to be true that in the present case the property of the "Romulus" did not pass wholly from the owner on the 26th February. The owner still had a chance of recovering the ship, and still had an interest therein which he could have insured, although he no longer retained possession. But the same might also be said to apply in some measure to enemy vessels for the reason that even these might, under some circumstances, be released by the Prize Court. The real question was whether there was a total loss by capture. As to this it appeared that there was a total loss by capture on the 26th February, the day on which the "Romulus" was lawfully seized, as shown by the

(*b*) That is, according to the doctrine of the British Prize Courts; but see p. 485, *infra*.

subsequent condemnation. There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released. According to the view contended for by the plaintiff, if the vessel had been insured against capture under a time policy which expired prior to condemnation, the liability of the underwriters would have been made to depend on the degree of expedition shown by a Court of Prize in adjudicating on the case, or even upon the taking of proceedings by way of appeal, a conclusion which was manifestly erroneous. The true view appeared to be that there was a total loss by capture on the 26th February, although its lawfulness was not authoritatively determined till the 16th May. That, at any rate, appeared to be the law of England on this subject.

In the case of neutral property taken as prize, notwithstanding that the captor acquires immediate possession, the title of the owner will not be regarded as completely divested unless and until a decree of condemnation has been passed, although in that event the divestment of title will date back to the original seizure. In the case of the property of subjects or allies taken as prize, as for illegal trading, the same principle would apply. In the case of enemy property, it is commonly laid down that as between captor and owner the divestment of title is complete as from the date of the original seizure (*c*); but in view of the fact that the captor is here, too, legally bound to proceed to adjudication (*d*) and that the result of such adjudication may conceivably be in favour of the owner, it would seem that the same principle now applies to enemy property. If this be so, then we have a uniform rule with respect to title and its divestment, as between the captor and the original owner, whether enemy or neutral (*e*).

In the case where a captor loses possession of his prize before condemnation, either by abandonment, or by recapture or rescue, then his inchoate right comes to an end. As regards abandonment, if this is voluntary and intentional, there can clearly be no further claim on his part, and the right of the original owner will thereupon revert, subject to any claim of salvage or new capture (*f*). In principle it would appear that the same rule should apply where the abandonment of the prize by the captor was involuntary, for the reason that his title is merely possessory, and dependent on the retention of control, either actual or constructive (*g*). In cases of rescue, and now also on recapture, the right

(*c*) Hall, 451-2.

(*d*) And this even though the property may have been lost or destroyed: *supra*, p. 193.

(*e*) *Supra*, p. 176.

(*f*) *The Diligentia*, 1 Dods. 404; *supra*, p. 176. But in *The Mary Ford*, 3 Dall. 188; Scott, 652)

of the original owner will revert, although subject to any lawful claim of salvage (*h*). But if, after recapture, the prize should be taken anew by the enemy, then the title will vest in the last captor, to the exclusion of any claim on the part of the original captor (*i*).

(iii) TITLE BY TRANSFER OR TRANSMISSION FROM CAPTOR.

THE "FLAD OYEN."

[1799: 1 C. Rob. 135.]

Case. During war between Great Britain and France, the "Flad Oyen," a British ship, was taken by a French privateer, and carried into the port of Bergen, in Norway. She then underwent "a sort of process," which terminated in a sentence of condemnation being pronounced by the French Consul. Under this sentence she was asserted to have been ultimately transferred to the claimant, who bought her at a sale by public auction. It appeared that the purchaser stood in the capacity of general agent in that place for the French Government, and in that capacity acted also as vendor. On the subsequent capture of the vessel by the British, an application was made by the original British owner for restitution, on the ground that there had been no regular sentence of condemnation by a competent Prize Court and, consequently, no legal transfer of the vessel from the original owner to the neutral purchaser. In the result, the vessel was restored to her former owner, subject to the payment of salvage to the recaptors.

Judgment. Sir W. Scott, in giving judgment, remarked that it had been frequently stated that the requirement of a sentence of condemnation as essential to the transfer of the property in prize was a doctrine peculiar to English law, and that

the American Courts took a different view, and awarded the proceeds of the prize, after deducting salvage, to the original captors, on the ground that a neutral Court could not pass upon the validity of belligerent captures: see also *The Mary*, 2 Wheaton, 123.

(*h*) See p. 214, *infra*.

(*i*) See *The Polly*, 4 C. Rob. 217 n.; and, on the subject generally, Phill. iii. 638.

according to the practice of some nations twenty-four hours' possession, or according to the practice of others the bringing of the prize *infra præsidia*, was enough to convert the prize. But it really appeared that according to the general practice of nations a sentence of condemnation was at present necessary to transfer the property in prize, and that a neutral purchaser, if he bought a prize during the war, must look to such a sentence as one of the title deeds of the ship. He doubted, indeed, if there were any instance in which a person who had purchased a prize vessel from a belligerent had thought himself secure in making that purchase merely because the ship had been in the enemy's possession for twenty-four hours or had been carried *infra præsidia*. The contrary had been more generally held; and the instrument of condemnation was one of those documents almost universally produced by a neutral purchaser. It was also necessary to show that the vessel had been subjected to adjudication in a proper judicial form. It was the first time that an attempt had been made to impose upon the Court for that purpose the sentence, not of a tribunal existing in the belligerent country, but of a person pretending to exercise authority in a neutral country. A sentence of condemnation could not be deemed sufficient unless it conformed to the usage and practice of nations. It would not be enough to show on mere theory that a Prize Tribunal might sit in a neutral country, without at the same time showing that such a proceeding was sanctioned by the common practice of nations. This, in itself, was sufficient to conclude the matter. But apart from usage, and looking merely to general principles, it did not appear that such a sentence could be sustained, for the reason that prize proceedings were always *in rem*, and this presumed that the body and substance of the thing was in the country that exercised jurisdiction in the matter (*a*). It was true that instances had been adduced in which British Courts under special circumstances had pronounced on prizes lying in certain foreign ports. But even if such proceedings were regular they would not support the present sentence, which emanated from a person having no authority over any but the subjects of his own country.

(*a*) That of the belligerent captor.

and acting in a neutral country which had no cognizance of matters of prize. For these reasons the ship was ordered to be restored to the British owners upon payment of the usual salvage.

This case decides that a captor has no title which he can validly pass to a purchaser unless the prize has been duly condemned by a competent Prize Court (*b*); and, further, that a sentence passed by a Court irregularly constituted and sitting in a neutral country will not be regarded as a valid condemnation. And this rule is a rule not only of the Court of Admiralty but also of the Courts of Common Law (*c*). In *The Kierlighett* 3 C. Rob. 96), however, it was held, in circumstances similar to those of *The Flad Oyen*, that the original owner, although entitled to restitution, was nevertheless accountable to a *bonâ fide* neutral purchaser for the fair value of improvements, in excess of ordinary repairs, which had been made by the latter subsequent to his purchase. By the Hague Convention, No. 13 of 1907, Art. 4, it is now provided that a Prize Court cannot be set up by a belligerent in neutral territory or on a vessel in neutral waters (*d*). But a sentence of condemnation will be good if passed in the courts of a co-belligerent or an ally (*e*). And, notwithstanding the doubts expressed on this point in *The Flad Oyen*, it appears, according to the British and American practice, a sentence of condemnation passed by the Courts of the captor's country will be good, and will found a good title, even though, at the time of the proceeding, the prize was lying in a neutral port (*f*). And the correctness of this view, internationally, appears to be borne out by the provisions of the Hague Convention, No. 13 of 1907, Art. 23 (*g*).

(iv) TITLE IN RELATION TO NEUTRAL STATES.

THE CASE OF THE "EMILY ST. PIERRE."

[1862: Moore, Extradition, i., 596; Wheaton (Dana), 475.]

Case. During the American civil war, the "Emily St. Pierre," a British vessel, was seized by a United States cruiser for an alleged breach of the blockade of Charleston, and sent in

(*b*) See also *Hudson* v. *The Resolution*, 2 Dall. 1; Scott, at 901; and *The Cassiopeia*, 3 C. Rob. 333.

(*c*) *Gass* v. *Wilhelm*, 2 Burr. 693.

(*d*) *Infra*, p. 301.

(*e*) *Oddy* v. *Bovill*, 2 East, 473.; *The Christopher*, 2 C. Rob. at 240.

(*f*) See *The Hoop*, 1 C. Rob. 43; *The Pelican* (Spinks, 57; the Manual of Naval Prize Law, Art. 277; and, in the American Courts, *Hudson* v. *Guestier*, 4 Cranch, 293; and *The Lucy Sibbles*, 2 Gall. at 39.

(*g*) *Infra*, p. 363.

for adjudication. The English crew were removed from the vessel with the exception of the master, the cook, and a steward; and an American prize crew of two officers and thirteen men put on board. During the voyage the master and cook rose against the American prize crew, disarmed and secured them, and, with the aid of some of the prize crew who were willing to assist in the navigation rather than to remain in confinement, managed to take the vessel to Liverpool, where she was restored to her former owners. The United States Government thereupon applied to the British Government for a restoration of the vessel, but this was refused.

Controversy.] On the part of the United States it was claimed, in effect, that the rescue of a neutral vessel which had been lawfully captured was a violation of the law of nations; and that this was in itself, and apart from any alleged violation of blockade, a sufficient ground of condemnation, as a breach of the neutral's duty to submit to adjudication in the Court of the captor. Earl Russell, in refusing the application, pointed out that rescue was not a violation of any municipal law of England, and, as the vessel was not in the custody of the British Government, the latter had no authority either to seize or to proceed against her. The offence, in fact, was solely one against the laws of war made for the benefit of the captors, and could only be given effect to in the captor's own Courts. Hence, even if the rescue was a ground for condemnation, a decree could only be made by the Prize Court of the belligerent. If a neutral subject rescued his vessel by force he took the risk of the captor's right of force as recognized by the law of nations, but nothing more. The Courts and Government of a neutral country could not decide that the title to the vessel had passed to the captors until there had been a condemnation by the Prize Courts of the captor. All that they could do was to restore to the captor that temporary possessory right which he had between capture and condemnation. But such possessory right was one of force, which only the captor's Government could assert, either by condemnation or other penalty on the property; although, even in this case, the rescuer incurred no

personal punishment. It was no more incumbent on a neutral Government to enforce such belligerent possessory rights against their own citizens, than it was to punish violations of foreign law, or breaches of foreign revenue systems, or breaches of a foreign blockade. In the result the controversy was put an end to by the discovery that in a previous case (*a*) where an American vessel had been rescued from British captors a similar claim had been made by the British Government and refused by the United States Government on the same grounds as those now put forward by Earl Russell (*b*).

It may now probably be taken as settled, that if a neutral vessel is captured by a belligerent, and, before condemnation, either escapes or is rescued, and reaches her own or any other neutral country, the neutral Government is not either bound or entitled to intervene with a view to her restoration. Nor could any such claim be made before a neutral Court: for, if based on capture, it would fail by reason of the fact that neutral Courts have no jurisdiction over belligerent captures as such, whilst, if based on ownership, it would fail by reason of the fact that a captor acquires no definitive title prior to condemnation (*c*).

General Notes.—*Prize and Booty, generally.*—In general, "prize" includes all property taken at sea, or as sea-borne property (*d*), whether it consists of vessels or goods, and whether it belongs to enemies or to neutrals, so long as, in the latter case, it has acquired a hostile character by reason of its employment or the acts of its owners. "Booty," on the other hand (*e*), consists of property seized on land by a belligerent force, merely as being the property of the enemy. But, under the existing laws and customs of war, private property is formally declared to be exempt from confiscation and must in general be respected (*f*). Hence "booty" is now

(*a*) That of *The Exchange*, see Wheaton, Digest, 475.

(*b*) See also the case of *The Lone* (3 Op. U. S., A. G. 377) an American vessel captured by the French but rescued by her crew prior to condemnation, where a similar claim was made by the French Government but refused by the United States on the same grounds as those taken by Earl Russell, as well as on the ground that if a vessel escaped from her captors and terminated her voyage in safety her liability to condemnation for the escape came to an end: Wharton, Digest iii. 479.

(*c*) Although, on the last point, see *The Maria Ford* (3 Dall. 188; Scott, 652); and p. 204 n. (*a*), *supra*.

(*d*) See *The Thetis*, p. 132, *supra*.

(*e*) Which only concerns us here by way of contrast to prize and in relation to the question of title.

(*f*) H. R. 46, 47. Save, of course, in so far as it may be required for military purposes: *supra*, pp. 111, 137, n. *h*.

practically confined to property belonging to the enemy State, such as State treasure or material of war, and to certain other forms of property such as arms, horses, and military papers taken on the field of battle (*h*).

The Title to "Booty." In theory, it would seem that the appropriation of enemy property, whether on land or sea, ought to be governed by similar principles. And, in fact, the appropriation of both "prize" and "booty" was once governed by the simple rule of effective seizure, as tested by their having been brought to a place of safety. But booty, as we have seen, fell under military regulation, and with the changes in military methods and organization became of comparatively little importance. In so far, however, as the question of title may still arise, it would appear to be governed by the original rule of effective seizure; although the ultimate disposition of the property will of course be subject to the regulations, civil or military, of the State to which the captor or the capturing force belongs (*i*). The history of prize was altogether different, and claims a more detailed examination.

The Title to "Prize." (1.) *Under the Earlier Law.* The question of title to property seized as "prize" may arise either as between the original owner and the captor; or as between the captor and his State; or, finally, as between the original owner and those claiming by transfer or transmission from the captor. Under the earlier law little was settled except that the title to prize depended on effective seizure; and even here the tests applied differed at different times and in the practice of different States or groups of States. According to one view, which dates back to the *Consolato del Mare*, the appropriate test was whether the property had been carried "*intra præsidia*" or to "a place of safety, so secure that the owner could have no immediate prospect of recovering it;" which was generally taken to mean the protection of a fleet or fortress or harbour, either of the captor's State or of an ally. But according to another view, which was more arbitrary in its character but frequently followed in the marine ordinance of European States, the appropriate test was whether the captor had remained in quiet possession of the property for twenty-four hours (*j*). Hence, if, according to one practice, the captor took his prize *intra præsidia*, or if, according to the other, he held it for twenty-four hours, he was deemed to have acquired a firm title which would pass to a purchaser on sale, even to the recaptor if it was re-taken. Of those tests the former was not only the earlier in point of time, but also tended to predominate in the later period; and may even now be said to apply

(*h*) Property of any other character, such as money and valuables, found on combatants must be delivered or transmitted to the authorities or commissioners appointed to receive it by the Bureau: see H. R. 4, 14, and p. 106, *supra*.

(*i*) As to the English law on this subject, see p. 201, *supra*.

(*j*) For a sketch of these principles, see Hall, 449 *et seq.*

except in so far as displaced by later usage or by positive regulation (*l*). Meanwhile, with the growth of trade and commerce, it had become the practice for maritime States, when at war, to require captors to submit their prizes and claims to the adjudication of Prize Courts, which were established for that purpose in their respective countries (*m*). This was probably designed at once to vindicate the rights of the State itself, which was at that time wont to claim a share in the prizes taken (*n*); to ensure an orderly procedure; and more especially to prevent international complications in cases where neutral interests were involved. But the necessity for adjudication appears to have been at first only a matter between the captor and his State; and in the case of enemy property it does not seem to have been originally a necessary factor in the captor's title. With respect to neutral property, however, the greater uncertainty attaching to captors' claims led, comparatively early, to the requirement of a decree of condemnation as a necessary condition of title. And this, again—taken in conjunction with the fact that under the system which then obtained the property of enemies was often mixed up with that of neutrals (*o*)—ultimately led to an extension of the same condition to enemy property; with the result that, in 1799, Sir W. Scott was able to declare that according to the general practice of nations condemnation was essential to the transfer of property in prize.

(iii.) *The Modern Practice.* Turning now to the modern practice, we find the governing rule still to be, that the right of the State takes precedence over that of the actual captor, who is deemed to be merely its agent. It is, however, still usual for the State to cede its interest in property taken from private owners to the actual captors; although this practice is, as we have seen, beginning to be viewed with some disfavour as involving the conduct of war for private gain, and its complete abandonment has been proposed (*p*). At the same time, the requirement of condemnation is now almost universal; and applies not merely to vessels and goods that are brought in, but also to such as may have been lost or destroyed prior to adjudication (*q*). Nor, despite the earlier rule of effective seizure, does it appear that there is now any interest acquired prior to condemnation, whether on the part of the captor or his State, beyond a mere possessory interest, which is liable to

(*l*) As to its application to booty, see p. 210, *supra*; and as to its continued applicability in, cert in, cases of maritime recapture, see p. 220, *supra*.

(*m*) As to the origin and history of Prize and Admiralty jurisdiction, see Oppenheim, ii. 238 *et seq.*; Westlake, ii. 122 *et seq.*

(*n*) Both in England and France this continued down to the middle of the eighteenth century: see Hall, 452 and n.

(*o*) *Infra*, p. 392.

(*p*) *Supra*, pp. 136 n. (*o*), 138 and n. (*r*); Pearce Higgins, 80 *et seq.* In the United States both prize money and bounty were abolished by an Act of Congress passed in 1899: see Moore, Digest, vii. 655.

And, by the Declaration of London, also to contraband voluntarily surrendered or taken from a neutral vessel that is herself not liable to destruction: see Arts. 44, 54; and p. 146, *infra*.

be forfeited by loss of possession. If the vessel is rescued and reaches a neutral port, neither the captor nor his State has, as we have seen, any claim either as against the neutral Government or before the neutral Courts (*r*). If, again, the captor should transfer the prize prior to condemnation then the transferee will acquire no valid title to it as against the original owner (*s*). If it is recaptured, then by municipal law the property in the prize commonly reverts to the original owner, although subject in this case to the payment of salvage (*t*). Nevertheless, as against an ally in war who followed the earlier rule that rule might still be applied, at any rate under the English law (*u*).

RECAPTURE AND SALVAGE.

(i) AS REGARDS BRITISH PROPERTY.

THE "CEYLON."

[1811; 1 Dods. 105.]

Case. During war between Great Britain and France, the "Ceylon," a British vessel, engaged in the East Indian trade, was captured by the French. She was thereupon refitted, and having taken on board some additional armament and a French crew, she was sent to the Isle of France, where she took part in the defence of that place against the British. She was subsequently dismantled and fitted out as a prison ship; and was, in that character, recaptured when the Isle of France was ultimately taken by the British. The original owner thereupon instituted a suit for the restitution of the vessel on payment of salvage. By the Prize Act then in force (*a*) it was provided, in effect, that British vessels recaptured from the enemy should be restored, on payment of salvage, except where a vessel had been "set forth for war." On behalf of the claimants, it was contended that the "Ceylon" had not been "set forth for war;" and also that there had been no "recapture" within the meaning of the Act, for the

(*r*) *Supra*, p. 209; and, as to the case of abandonment, p. 204.

(*s*) *Supra*, p. 207; Kent, Com. i. 102; Halleck, ii. 367; Scott, 919.

(*t*) Under the English system it will revert even after condemnation unless the vessel has been fitted out as an armed vessel; *infra*, p. 214.

(*u*) *Infra*, p. 220.

(*a*) 45 Geo. III. c. 72.

reason that recapture applied only to a retaking by naval forces and not to one effected, as in the present case, by the conjoint operation of land and sea forces. In the result both these contentions were rejected, for the reasons given in the judgment, and the vessel condemned as prize to the recaptors.

Judgment. Sir W. Scott, in giving judgment, held that in order to come within the exception set up by the statute, it was not necessary to show that a vessel had been formally commissioned or sent out of port on an errand of war, but only that she had been employed in the public military service of the enemy by persons having the requisite authority. In the circumstances he could not doubt that the "Ceylon" was sufficiently "set forth for war," or in other words "used as a ship of war" to satisfy the Act, and that she was so used by competent authority. As to whether there was a "recapture" within the meaning of the Act, the Act was drawn with the intention of expressing the sense and meaning of the law of nations as it then existed. It merely mentioned ships and boats as being the usual mode of recapture by sea, and was not intended to exclude other modes of capture. But, even if the case did not fall within the Act, it must not be forgotten that by the earliest law of Europe a *pedactio infra præsidia* was a sufficient conversion of the property, and that by a later law a possession of twenty-four hours was sufficient to divest the former owners, so that, according to the ancient law of this country, which was in unison with the ancient law of Europe, there was a total abdication of the rights of former owners by [1]. It was true that this old law had since been receded from as the commerce of the country increased; and that an ordinance of 1649 had, in cases of the recapture of the property of British subjects, directed a restitution on salvage; the same rule being continued afterwards when the country became still more commercial. But the earlier rule still had not controlled the provisions of the statute about the prize; and he was fitted out as

[1] Reference is made to the *Consolato del Mare*, Art. 287, as explained by Casaregis and Barbeyrac; and to the fact that the rule of conversion by effective possession was originally followed alike in Scotland, France, and even England.

a vessel of war. Hence, if the case did not fall within the Act (*c*), the Court would regard it as coming under the old rule of the law of nations, by which the rights of the owner were completely divested. In the present case, however, there was no necessity for resort to this, and the vessel would be condemned to the recaptors under the Prize Act itself.

Although this decision was given under a statute since repealed, a similar provision is contained in the Naval Prize Act, 1864. This provides in effect that where any ship or goods belonging to British subjects, after being taken by the enemy, are retaken by any of H. M. ships of war, the same shall be restored by decree of the Prize Court to the owner, on payment as salvage of one-eighth of their value, as ascertained by the Court or agreed upon by the parties with the approval of the Court; with power to the Court to increase the salvage in circumstances of special difficulty or danger up to one-fourth of the value; but subject to the proviso that if the ship was used by the enemy as a ship of war the provision for restitution shall not apply, and the ship shall be treated as ordinary prize (*d*). In order to bring a vessel within the scope of the proviso, it is not necessary to show that she was formally commissioned as a vessel of war (*e*), but only that she was employed by competent authority in the naval service of the enemy (*f*). Another exception to the rule of restitution exists where the recaptured vessel, being British, is found to have been engaged in an unlawful trade prior to her capture (*g*). Nor will that rule apply, in favour of the original captor, where an enemy vessel has been captured, and then retaken, and subsequently recaptured by the British (*h*).

With respect to salvage, this is a reward payable to a captor in cases where restitution is granted (*i*). It may be claimed either by commissioned or non-commissioned vessels (*k*), or even by the crew of the captured vessel itself (*l*). To entitle a recaptor to salvage, there must have been an actual or constructive original capture, and a subsequent recovery of the property from the enemy, not necessarily in the sense of a forcible retaking, but in the sense of a termination of the hostile control through the action of the recaptor (*m*). The claim to salvage will be extinguished if the

(*c*) That Act regards the question of restitution.

(*d*) Ss. 30, 31.

(*e*) *The Hoop*, 1 C. Rob. 196.

(*f*) *The Georgiana*, 1 Dods. 397; *The Hoop*, 1 C. Rob. 196; *The Diligentia*, 1 Dods. 241; Rob. 77.

(*g*) *The Hoop*, 1 C. Rob. 196; and see page Maxims of Law, Arts. 261–269.

(*h*) As to its original character, see p. 229, *ante*.

(*i*) *The Two Catharines*, 5 C. Rob. 148); *The Elsebe*, 4 C. Rob. 271; *The Betsey*, 3 C. Rob. 292).

(*k*) Where property is recovered without being actually "retaken" within the meaning of the Prize Act,

vessel is captured anew and condemned by the enemy, although it will revive if the prize is ultimately released and restored to her original owner (*o*). It will also be forfeited by proof of misconduct on the part of the recaptors (*p*). Property retaken from pirates is in English law *prima facie* condemnable to the Crown as *droits* of Admiralty, but if any part can be shown to have belonged to private owners the Court may direct restitution on payment of a salvage of one-eighth (*q*).

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(ii) AS REGARDS THE PROPERTY OF AN ALLY OR CO-BELLIGERENTS.

THE "SANTA CRUZ."

[1798: 1 C. Rob. 50.]

Case. During war between Great Britain and France, Portugal being the ally of the former, certain vessels belonging to Portuguese subjects were captured by the French, but subsequently recaptured by the British; in each case after remaining in the possession of the enemy for more than twenty-four hours. One of these vessels was retaken in August, 1796; another in the interval between December, 1796, and May, 1797; whilst the rest were retaken after the latter date. A claim for restitution was made by the owners; but this was resisted by the recaptors on the ground that in analogous cases the Portuguese Courts had condemned British vessels. As to this it appeared that in December, 1796, an ordinance had been issued by Portugal declaring all vessels recaptured after possession by the enemy for twenty-four hours to be lawful prize; but that in May, 1797, another ordinance had been issued directing restitution in such cases, subject to the usual salvage. In the result the Court, acting on the rule of reciprocity, condemned the vessel captured prior

salvage may be awarded under the general maritime law; see *The Lord Cavendish*, 3 C. Rob. 305; *The Prosperous*, 1 Edw. 240; and *The Henry*, 1 Edw. 192, where a cognizance from the enemy was treated as a salvage service.

(*o*) *The Charlotte* (1801), 4 Docks. 192. Salvage for each vessel decreed for the recapture of a vessel which was accidentally destroyed after appraisement; see *The Three Friends*, 1 C. Rob. 268.

(*p*) *The Bee*, 3 C. Rob. 154.

(*q*) See 13 & 14 Vict. c. 26; and as to the practice of other countries on the subject of recapture and salvage, p. 220, *infra*.

to December, 1796, on the ground that the law of Portugal in the like case would have subjected an English vessel to condemnation: a similar sentence was pronounced, for the like reason, with respect to the vessel retaken between December, 1796, and May, 1797: but all vessels retaken after the date of the decree of 1797 were restored, subject to the payment of salvage at the same rate as that allowed by Portuguese law (*a*).

Judgment. Sir W. Scott, in his judgment, observed that in consequence of the conflicting practice of States on this subject there appeared to be no rule that could claim the authority of a general law. With respect to the divestment of the title of the original owner, it might be that the test should be that of immediate possession by the captor, or twenty-four hours' possession, or the bringing of the property *infra præsidia*, or the passing of a sentence of condemnation. But, although in principle nations concurred in requiring a secure possession, the proof of this required in practice was altogether discordant. Under the circumstances, for Great Britain to lay it down that bringing *infra præsidia* although this was probably the true rule was in all cases necessary to divest the right of the original proprietor, might work injustice to British subjects, to whom a different rule might be applied by other States. In such circumstances the proper proceeding was to apply, in the first instance, the rule of the country to which the recaptured property belonged. Even if there was no positive rule, there was usually a usage of the Courts of Admiralty: but in this did not exist, then it would be necessary to apply one's own rule. With respect to the law of England on this subject, it appeared that that law, having adopted a most liberal rule of restitution as regards the recaptured property of its own subjects, gave effect to that rule to allies until it appeared that they acted towards British property on a less liberal principle; and that in such case it treated them according to their own measure or justice. This principle of reciprocity was not by any means peculiar to cases of recapture, but was found to be operative in other cases of

(*a*) This being more favourable to public vessels and less profitable to privateers.

maritime law, and in this respect was even sanctioned by Magna Charta (*b*). The question was, then, whether Portugal had applied a different rule, under similar circumstances, to British property. After a careful review of the evidence on this point, the learned judge came to the conclusion that the law of Portugal established twenty-four hours' possession by the enemy as a legal divestment of the property of the original owner; that it applied the same rule to the property of allies; and that this rule had been acted on in practice. Having regard to this, he had no hesitation in pronouncing the first two cases to be subject to confiscation. But as regards the other cases of recapture, inasmuch as, in May, 1797, Portugal had adopted a more liberal rule, under which recaptured property was restored, although subject to a higher rate of salvage, it would not be right to refuse to Portuguese subjects the benefit of this alteration; and restitution would therefore be decreed, subject to salvage at the rate established by the law of Portugal.

This case serves to illustrate the practice of the British Courts with respect to the restitution of vessels or goods belonging to the subjects of an ally or co-belligerent which have been captured by an enemy but recaptured by the British navy.

A somewhat different question arose in the case of the *Two Friends* (1 C. Rob., 271). In that case Great Britain being at war with France and the United States being also involved in *de facto* hostilities with the same country although not as the ally of Great Britain, an American ship had been captured by the French, and subsequently recaptured by her crew, some of whom were British subjects, and brought into a British port. Salvage in respect of the recapture was claimed, and claimed by the British seamen. To this it was objected that the Court had no jurisdiction over an American vessel which had been recaptured by her own crew. In the result the claim for salvage was allowed, it being held that inasmuch as it was no part of the ordinary duty of seamen to effect a rescue, the services were not to be considered only in the right of American citizens; that even if the crew had been American citizens they might have lost their character by the exercise of such a profession; and the case was that salvage was a question of *locus poenitentiae*;

(*b*) [illegible] p. 271; and as to the American persons not [illegible] see p. 220, [illegible].

[illegible] The amount of salvage is not [illegible] with precision being determined [illegible] on the principle of [illegible]

and, finally, that where, as in the present case, the interests of British subjects were concerned and goods subject to the salvor's lien were found within the country of the Court, such a jurisdiction undoubtedly existed.

(iii) AS REGARDS NEUTRAL PROPERTY.

THE "CARLOTTA."

[1803: 5 C. Rob. 54.]

Case. In 1803, during war between France and Great Britain, in which Spain was neutral, the "Carlotta," a Spanish ship, was captured by the French whilst on a voyage from Monte Video to London; but was subsequently recaptured by the British. A claim to salvage was preferred, but this was resisted by the owners on the ground that no salvage could be claimed on a recapture of neutral property, save in circumstances which did not exist in the present case. In the result the claim for salvage was rejected.

Judgment. Sir W. Scott, in giving judgment, stated that the tendency was against subjecting neutral property recaptured from the enemy to salvage. At the same time, if in a particular case any fact could be established or edict appealed to showing that the property in question would have been exposed to condemnation, he would hold that to be a sufficient ground for awarding salvage. The rule that salvage could in no case be claimed on a recapture of neutral property was one subject to exceptions. But as, in the present case, there did not appear to be any grounds on which it could be supposed that neutral Spanish property would have been condemned, he could not pronounce salvage to be due.

Neutral property is not in general exposed to condemnation. Hence if such property is captured by one belligerent and retaken by the other, the latter ought to restore it to the neutral owner without payment of salvage, on the assumption that the Courts of the captor would not have condemned it, and

that no meritorious service was therefore rendered (*b*). Nevertheless, if the facts show that the Courts of the captor would in fact have condemned the property—whether in accordance with admitted principles (*c*), or even under positive regulations not in accordance with the general usage (*d*)—then salvage will be decreed (*e*).

In the converse case, where a neutral Court is asked to award salvage in respect of property captured by a belligerent, but rescued by neutrals after loss or abandonment by the captor, it appears that inasmuch as salvage is a matter of the *jus gentium* (*f*), the Court is entitled to make an award so long as the property actually lies within its jurisdiction (*g*).

General Notes—*The Rights of Recaptors.* As regards property retaken on the sea, which alone concerns us here, the respective rights of the original owner and recaptor were originally governed by that general maritime law which is referred to by Lord Stowell in his judgment in the *Ceylon* (*h*). Under this the prize was deemed to belong to the recaptor if the captor had previously acquired a title to it; whilst if he had not then it reverted to the original owner *jure postliminii*. The question of whether the captor had acquired a title in such a case originally depended, according to one practice, on whether he had carried the prize *infra præsidia*; or, according to another, on whether he had held possession of it for 24 hours (*i*). But the growth of commerce and the strengthening of the mercantile interest, added to the fact that the recaptors in such cases were generally fellow subjects of the original owners, gradually led to the adoption of a new practice. By this the transfer of the property to the captor by effectual seizure was ignored as between the recaptor and the original owner, and the property restored to the latter; subject, however, in all cases to the payment of a suitable reward to the former. This change of system was effected in England by an ordinance of 1649 (*k*), and was sooner or later followed by most other maritime States, with the result that the practice of restitution on recapture

(*a*) See *The Hoop*, Ostsee, 2 C. Rob. 299; and Manual of Naval Prize Law, Art. 270. In the earlier period, indeed, there are traces of a pretension to appropriate all ships and goods taken out of the hands of the enemy; but in the later period a more equitable practice came to prevail. See *The Santa Cruz*, 1 Wheat. 199.

(*b*) As where the vessel is carrying contraband, or involved in breach of blockade, see *The Hoop*, 1 C. Rob. 196; *The Santa Cruz*, 1 Dods. 49.

(*c*) So long as there was reasonable ground for believing that the property would in fact have been condemned, even though unjustly. *The Two Ostsee*, 2 C. Rob. 299; *The Ceylon*, Edw. 251.

(*d*) See p. 217.

(*e*) *The Two Ostsee*, 2 C. Rob. 299; *The Hoop*, 3 Edw. 1850; and as to the question of title in such cases, p. 204.

(*f*) See p. 213.

(*g*) See p. 240.

(*h*) See p. 23. The Court had adopted it even [illegible] 1815.

became general. But there was, and still is, a great lack of uniformity in the various municipal systems as regards the precise conditions of restitution (*l*). In so far, moreover, as the municipal rule of restitution does not apply, recourse will still be had to the earlier law (*m*).

Existing Variations of Practice.—The British practice, as we have seen, is to restore the ships and goods of subjects recaptured from an enemy on payment of a salvage of one-eighth, which may, however, under the statute, be increased to one-fourth in circumstances of special danger or difficulty (*n*); and this whether the recapture was effected before or after condemnation, so long only as the prize, being a vessel, was not employed in the naval service of the enemy (*o*). The same rule of restitution on recapture is applied to the property of an ally, unless it appears that a less liberal rule is applied to British property, in which case recourse is had to the principle of reciprocity (*p*). Neutral property, on recapture, is restored on the presumption that the enemy would not have condemned it; but this presumption may be rebutted, and in such a case restitution will only be made on payment of salvage (*q*). The practice of the United States is to restore the ships and property of citizens or inhabitants which have been recaptured from the enemy, subject to the payment of salvage. But such restitution will only be made when the recapture has been effected before condemnation, in which case it is made irrespective of any use to which the vessel may have been put by the enemy (*r*); whilst if effected after condemnation then the property will, as under the earlier law, belong to the captor (*s*). If the property recaptured belongs to subjects of a friendly State, the practice is to restore it so long as it was retaken before condemnation, but subject to a condition of reciprocity, and on the same terms as to salvage as would have been applied to the property of United States citizens in similar circumstances, or, in default of any rule or usage on the subject, then on payment of such salvage as would be ordered under American law (*t*).

Salvage.—The term 'salvage' in its maritime connection denotes either the service of saving a thing at risk at sea, or, more usually, the reward for doing so. In each sense salvage may be either of life, as where a vessel or her cargo or the lives of those on board have been saved from loss or destruction by the perils of the

(*l*) *Supra*, p. 212.

(*m*) *Supra*, p. 214.

(*n*) *Supra*, p. 216.

(*o*) *Supra*, p. 218.

(*p*) *Supra*, p. 218.

(*q*) *Supra*, p. 218.

(*r*) *Supra*, p. 219.

(*s*) *Supra*, p. 219.

(*t*) Act of 1800, s. 2, and now modified in part by Act of 1861; see Rev. Stat. § 4372.

(*u*) The Sarah, 8 Wheat. 391.

(*v*) Act of 1800, s. 2.

(*w*) For the law of salvage see Abbott, 13th ed. 1866, p. 1; and Maclachlan, Carriage of Goods by Sea, 1880, p. 1.

sea; or (2) military, as where either vessel or goods are rescued from an enemy in time of war or from pirates at any time. Military salvage, with which alone we are here concerned, is really a part of the law of prize, and is often known as prize salvage (*w*). Like other rights incident to recapture, it was once governed by general maritime custom, but it is now governed for the most part by positive regulations adopted by each municipal system. Nevertheless, salvage is, in some sort, still a matter of the *jus gentium*; and the Courts of one country may, if the property saved is found within their jurisdiction, adjudicate thereon, even though the salvors are subjects of other States; the amount in this case, as well as in other cases not provided for by municipal regulation, being determined by reference to the rule of *quantum meruit* (*x*).

THE TERMINATION OF WAR.

THE MAKING OF THE PEACE OF PORTSMOUTH, 1905.

[Hershey, The International Law and Diplomacy of the Russo-Japanese War, 341 *et seq.*; Takahashi, 219, 774.]

Events leading to Peace.] The Peace Convention of 1899, amongst other things, declared it to be expedient that neutral Powers should, if possible, offer their good offices and mediation to States at variance, and, further, that this might be done even during the course of hostilities, and should not under any circumstances be regarded as unfriendly (*a*). In June, 1905, during the progress of the Russo-Japanese war, the President of the United States, relying on these provisions, approached the belligerent Governments with a request that they would, not only for their own sakes but in the interest of the whole civilized world, open negotiations for peace; suggesting at the same time a meeting of delegates for this purpose, and offering his services, if required, in the matter of arranging preliminaries as to the time and place of meeting. The time was propitious: for Port Arthur had fallen in the previous January, the battle of Mukden had

(*w*) Both military and civil salvage may be awarded if both services are rendered: *The Two Ellens*, L. R. 1 P. C. 358; *The Two Ellens*, 1 Dods. 317.

This applies equally in cases of civil salvage: *The Two Ellens*, *supra*; *The Two Ellens*, 1 Wilson, Adm. R. 317; Scott, 230; and military salvage: *The Two Ellens*, L. R. 1 P. C. 358; *The Two Ellens*, 1 C. Rob. 271; *supra*, p. 217.

(*x*) See Art. 3. These provisions are reproduced and even strengthened in the corresponding Convention of 1907, Art. 3.

been fought in March, and the Russian fleet had been virtually destroyed at the battle of Tsushima, thus leaving Japan, for the time being, in a position of predominance. A favourable reply was received from each of the belligerents, and thereupon the necessary arrangements were made for the holding of a Peace Conference at Portsmouth, in the United States. The first meeting was held on the 9th August, 1905; Russia being represented by M. Witte and Baron Rosen, and Japan by Baron Komura and M. Takahira. It was arranged that any language might be used; that the protocols should be drawn up in English and French, the French text being decisive; and, finally, that the discussions and proceedings should remain secret. The Japanese conditions of peace were then presented to the Conference and discussed at successive meetings. These conditions were originally twelve in number, and included various stipulations with respect to Korea and Manchuria, the cession of Sakhalin, Port Arthur, and Dalny, the surrender of Russian warships then interned in neutral ports, the limitation of Russian naval forces in the Far East, and reimbursement for the costs of the war *b*. Of these demands, Russia, in the first instance, refused even to consider those relating to Sakhalin and the indemnity; whilst she pronounced the proposed surrender of the interned ships to be contrary to international usage, and the proposed limitation on her naval forces in the East to be derogatory to her dignity. In the course of the discussions that ensued the two latter claims were abandoned. But Japan continued to press her claim for the surrender of Sakhalin on the grounds of her former ownership, her present possession, and the principle of *uti possidetis;* whilst Russia objected on the ground of the essentiality of that island for the due protection of her Eastern provinces. As the result of a direct appeal to the Czar, however, the Russian delegates receded from this position to the extent of expressing their willingness to consider the question of the surrender of the southern part of Sakhalin *c*. But this was far from satisfying Japan; and at the time it appeared that, both on the question of

b. Estimated then at from one to two hundred millions sterling.

c. Thus saving Russia's strategic position by retaining the northern part.

Sakhalin and that of the indemnity, the negotiations for peace must fail. On the 28th August, however, Japan withdrew her demand for an indemnity, and also agreed to accept the proposed division of Sakhalin; and with the removal of these obstacles the terms of peace were arranged, and the treaty of peace signed on the 5th September. In the meantime an armistice in general terms was signed at Portsmouth on the 1st September. By this it was provided that a zone of demarcation should be fixed between the two armies in Manchuria; that no further naval bombardments should be undertaken; that no reinforcements should be despatched to the theatre of war; that those already *en route* should not be despatched to certain localities mentioned; and that further details should be left to be determined by the respective commanders of the opposing forces, in conformity with these provisions; but that maritime captures should not be suspended during the armistice. This general armistice took effect as from 5th September. Meanwhile, an armistice more specific in its terms was concluded for Manchuria, taking effect as from the 16th September. Finally, on the 14th October, 1905, the definitive treaty was ratified by both parties.

The action of Japan in this matter was probably determined in a great measure by domestic considerations; but, in some measure, also, by a desire to defer to international opinion, by the influence of the United States, and probably also by that of Great Britain, with whom Japan had meanwhile concluded an offensive and defensive alliance (*d*).

The Terms of the Treaty.] The more important provisions of the treaty were, in effect, as follows:—(1) Peaceful relations between the Powers and their subjects were formally re-established (*e*). 2 Russia recognized Japan's paramount interests

(*d*) This was concluded on the 12th August, 1905. By Art. 8 the alliance was to endure for ten years certain, and thereafter until denounced by either party by twelve months' previous notice, but subject to a proviso that if either party were engaged in war at the date fixed for its expiration, the alliance should continue until peace was concluded. On the 13th July, 1911, this was replaced by a new agreement, following generally on the lines of the former treaty, but with the omission of certain Articles, and further providing that should either Power conclude a general treaty of arbitration with a third Power, nothing in the agreement should entail any obligation to go to war with the latter; thus clearing the way for the general treaty of arbitration between Great Britain and the United States.

(*e*) Art. 1.

political, military, and economical in Korea, and engaged to respect the same (*f*). (3) The contracting parties mutually engaged to evacuate Manchuria, except the leased territory of the Liao-tung peninsula, within the times and under the conditions prescribed by the treaty, saving, however, the right of both to maintain a limited number of guards sufficient for the protection of their respective railways; and also to restore the Chinese administration in the parts so evacuated, Russia abjuring all territorial or other advantages which might derogate from Chinese sovereignty or the principle of equal opportunity (*g*). (4) Russia, with the assent of China, transferred to Japan the lease of Port Arthur, Ta-lien-wan, and all attendant territory (*h*), together with all works thereon; all proprietary rights of Russian subjects being respected (*i*). (5) Russia, with the consent of China, transferred to Japan the railroad from Chang-chun to Port Arthur (*k*) with all rights appurtenant thereto (*l*). (6) Both parties engaged to exploit their railways in Manchuria for commercial and not strategic purposes (*m*), and to conclude as soon as possible a convention regulating the connecting services (*n*). (7) Russia ceded to Japan in perpetuity that portion of the island of Sakhalin lying south of the 50th deg. N. lat., the exact boundary to be determined by a delimitation Commission to be appointed thereafter; each party also engaging not to erect fortifications or to impede the free navigation of the Straits of La Perouse and Tartary (*o*). (8) Russian subjects within the territory ceded to Japan were to be at liberty either to sell their property and withdraw, or to remain, with full protection, on submitting to the Japanese laws and jurisdiction (*p*). (9) Russia engaged to concede to Japanese subjects concurrent rights of fishery along the coasts of Russian possessions in the Japan, Okhotsk, and Behring Seas (*q*). (10) The prior treaty of commerce and navigation having been annulled by the war, the contracting parties agreed, pending the conclusion of a new treaty, to adopt reciprocally

(*f*) Art. 2.
(*g*) Art. 3, and sub-Art. 1.
(*h*) See vol. i. 119.
(*i*) Art. 5.
(*k*) The southern branch of the trans-Manchurian line.
(*l*) Art. 6.
(*m*) This, however, did not apply to railways within the leased territory transferred to Japan.
(*n*) Arts. 7, 8.
(*o*) Art. 9, and sub-Art. 2.
(*p*) Art. 10.
(*q*) Art. 11; see vol. i. 111, 950.

the most favoured nation treatment (*r*). (11) All prisoners of war were to be mutually restored, each party appointing a special commissioner for the purpose of arranging and taking delivery of the prisoners remitted by the other. Each party was also to render to the other a statement of expenditure incurred on the prisoners' behalf; Russia engaging to pay to Japan any balance that might be due (*s*). (12) The treaty was signed in duplicate in both English and French, it being provided that the latter text should prevail in case of discrepancies.

This Treaty may be regarded as an extra-judicial settlement of the controversy which gave rise to the war, as well as of that which arose out of the opening of hostilities (*t*); whilst it is also noteworthy as involving a new territorial settlement of some international importance (*u*). The proceedings that attended it serve both to illustrate the forms and methods usually followed in arranging a treaty of peace between Powers previously at war—in relation, that is, to the opening of negotiations, the arrangement of general and special armistices (*v*), and the subsequent conduct of the negotiations; and also to indicate, generally, what matters, other than the settlement of the main issues of the controversy and the formal re-establishment of peaceful relations, have commonly to be provided for—matters, that is, such as the delimitation of ceded territory and the safeguarding of the interests of the ceding Power and its subjects therein, the revival of treaties, the continuance of commercial and other relations depending on treaties annulled by the war, the repatriation of prisoners, and the defrayal of the cost of their maintenance.

General Notes. *How War may Terminate.* The three possible ways in which war may come to an end are: (1) By a definite cessation of hostilities on either side; (2) by the conquest and complete absorption of one belligerent State by the other; and (3) by the conclusion of a treaty of peace. The termination of war by mere cessation of hostilities is very rare, although not un-

(*r*) Art. 12; and vol. I. 330.

(*s*) Art. 13. The [illegible] provides with respect to [illegible] see Art. 14.

[illegible] p. 5.

[illegible] vol. I. 11, [illegible] it will [illegible] [illegible] Nov. 1905.

already referred to, the final pendence of Korea was virtually extinguished [illegible] 1910, it was formally annexed by Japan.

(*v*) Although special armistices are often arranged before the terms of the definitive treaty are settled,

known even in modern times. In the war between Spain and her American colonies, for instance, active hostilities were gradually dropped, and came practically to an end about 1825, although peaceful relations were not formally restored, at any rate as regards some of the colonies involved, until 1840. What period of suspension is necessary to justify the presumption of the restoration of peace will, of course, depend on the actual circumstances (*y*). But such a condition of things is embarrassing to neutrals, and also leaves the relations of the belligerents themselves undetermined, although in such a case the principle of *uti possidetis* would probably be held to apply (*z*). Such a situation, however, is not one that is likely to recur, at any rate in a war between States of any magnitude. Where war is terminated by the conquest and absorption of one State by the other, there is, of course, no scope for any formal treaty of peace; but the close of the war is commonly marked by some formal proclamation or announcement on the part of the conqueror, or by some formal act of surrender on behalf of the inhabitants (*a*). So, in the South African war, the annexation of the Orange Free State was proclaimed on the 24th May, 1900, and that of the South African Republic on the 1st September, 1900; but these announcements were really premature, and the actual termination of the war must be referred to the agreement of surrender made at Vereeniging on the 31st May, 1902. Ordinarily, however, the termination of a war is marked by the formal conclusion of a treaty of peace, which is thereupon notified both to the subjects of the belligerents and the world at large.

The Making of the Treaty of Peace. The part played by good offices and mediation in the opening of negotiations for peace, and the incidental procedure, have already been touched on (*b*). The fact that negotiations for peace have been entered on does not, however, in itself suspend hostilities; although such a suspension is usually provided for by armistice, which is itself governed by the laws and usages of war (*c*). The treaty of peace is sometimes preceded by "preliminaries of peace," which are intended not merely to suspend but to bring both hostilities and other incidents of the state of war to a close at an earlier moment than the arrangement of a definitive treaty would allow. They embody, in fact, the essential conditions agreed on, and, although intended to be replaced and capable of being modified by the definitive treaty, they are regarded as binding as from the date of their signature (*d*). Sometimes, however, either by the preliminaries of peace or by the definitive treaty, a future date is fixed for the termination of hostilities, or even different dates for different localities; the effect of which will be considered hereafter (*e*). The actual terms of peace depend, of course, on the relative position of the parties. Nevertheless the effect of a war of

(*a*) Moore, Digest, vi. 336; Taylor, 605.
But see Phill. iii. 772.
(*b*) Moore, Digest, vi. 537.
(*y*) *Supra*, p. 221.
(*c*) *Supra*, p. 100.
(*d*) Hall, 555, n.
(*e*) *Infra*, p. 232.

any magnitude on the interests of other States is now so considerable, that both the conclusion of peace and the terms agreed on are often influenced greatly by the pressure of international opinion, of which the Treaty of Portsmouth may be said to afford an example (*f*).

Authority to make. In order to be binding, a treaty of peace must, like any other international act, have been made or ratified by some authority competent to make it under the domestic constitution—of the provisions of which in this regard the other contracting party will be presumed to have notice (*g*). The terms of a treaty of peace otherwise duly concluded between the belligerents may, moreover, conceivably be impugned by other States as incompatible with their legitimate interests, or as affecting matters that have previously been the subject of international settlement. It was on this ground that the terms of the Treaty of San Stefano, which was concluded in 1878 between Russia and Turkey, were revised by the Congress of Berlin (*h*). On this ground, too, it would seem that the assumption of a new status on the part of Bulgaria in 1908, and the annexation of Bosnia and Herzegovina by Austro-Hungary, which immediately followed (*i*), ought strictly to have been submitted for approval to the signatories of the Treaty of Berlin, 1878 (*k*). But terms likely to give umbrage to other Powers are often embodied in secret articles of agreement.

Usual Stipulations.—In addition to the formal establishment of peaceful relations as between the States previously at war, and apart from such special terms as may be necessary or appropriate, a treaty of peace usually provides for the immediate or ultimate evacuation of territory not intended to be ceded; for the actual transfer of territory agreed to be ceded and not already in occupation of the proposed transferee (*l*); for the delimitation of boundaries and the protection of the interests of subjects of the ceding State; for the repatriation of prisoners and the payment of any balance that may be due in respect of their maintenance; for the renewal or replacement of treaties abrogated by war; and sometimes also for the granting of an amnesty (*m*) and the payment of a war indemnity (*n*).

The Legal Effects of a Treaty of Peace. The main effect of a treaty of peace is to re-establish both as between the States concerned and their respective subjects those normal relations which obtain amongst members of the society of nations. As between the States previously at war, hostilities and all acts incidental thereto necessarily

(*f*) See *ante*, p. 223.

(*g*) See vol. i. 339 *et seq.*; although the power to conclude peace is not always vested in the same authority as the power to make war: *Ex parte* S., p. 17.

(*h*) See vol. i. 42; Oppenheim, ii. 329.

(*i*) See vol. i. 55, 115.

(*k*) An attempt on the part of the British Government to procure the submission of these questions to a European Conference appears to have been thwarted by the action of Germany.

As to the necessity for this, see *The Leon*, 5 C. Rob. 196.

(*l*) *Infra*, p. 228.

(*m*) *Infra*, p. 229.

come to an end, military or martial law ceases to apply (*o*), and the inhabitants are remitted to their rights under the territorial law (*p*); prisoners of war are released; and both diplomatic intercourse between the States and commercial intercourse between their subjects are resumed. All prior engagements, moreover, whether on the part of the States themselves or of their subjects, which were merely suspended by war, together with all consequent remedies, are revived. The treaty serves to mark the moment from which these results ensue. As regards matters occurring before the war, the treaty is presumed to put an end to all pretensions founded on acts or defaults that gave rise to the war, and to merge all consequent rights and obligations in the new rights and obligations set up by the treaty. As regards acts done during or in relation to the war, even though irregularly, such acts cannot, except by express reservation or subsequent agreement, be made the ground of any public or private demand or proceeding as between parties who were previously hostile (*q*). This will not, indeed, preclude a State from proceeding against such of its own subjects as may have compromised themselves by dealings with the enemy; but an amnesty clause is sometimes inserted which will cover even these acts, although it will not affect actions arising out of private contracts or criminal prosecutions for acts having no relation to the war (*r*). With respect to territory, if no provision is made for its cession or evacuation, the rights of the parties are deemed to be governed by the principle of *uti possidetis*, in virtue of which each retains such territory as is under his control at the time of the termination of the war (*s*). And the same principle applies equally to moveable property in the possession of either belligerent. On the other hand, where a return to the *status quo ante bellum* is stipulated for, all property formerly belonging to one party but at the time in the possession of the other must be restored, although this will be subject to any changes wrought by the war and to any acts lawfully done during its continuance (*t*). With respect to the property of subjects or one belligerent that may be found in the territory of the other, the right to full enjoyment of this, if, indeed, it has been the subject of restriction or sequestration during the war, will revert without express stipulations on the restoration of peace. But this will not apply to property which has already been confiscated, in cases where confiscation is permissible; nor will it apply to maritime property which has

(*o*) [illegible] of the territory [illegible] under occupation as by way of security for the payment of an indemnity.

(*p*) [illegible]

(*q*) See [illegible] 66 C. [illegible] extended to [illegible] and, [illegible] under [illegible] domination, [illegible] the [illegible] was [illegible] the [illegible] [illegible]

(*r*) As to the definition of [illegible] of war, see p. 107, [illegible] As regards acts done after the war and in ignorance of peace, [illegible] of *The Josefa*, [illegible] p. 229.

(*s*) See Pub. Int. Opp[illegible] ii. 231. On this [illegible] according to which territory [illegible] assigned [illegible] Taylor 605; and 1 Ill. [illegible]

(*t*) See Pub. Int. [illegible]

already been captured, as to which a decree of condemnation may be pronounced even after the war, although this right is occasionally waived (*a*). Where part of the territory of one belligerent is ceded to the other, the rights of the inhabitants are usually safeguarded by express stipulation; but even without this by general usage, to which municipal law commonly conforms, their proprietary and personal rights are usually respected (*x*). This will not, however, preclude the new Sovereign from enforcing rights of forfeiture which would have availed his predecessor in title in the like circumstances (*y*). The legal consequences of cession, in other respects, have already been described (*z*).

The Question of Indemnity. The exaction of a monetary indemnity, in addition to the cession of territory or other advantages, has become a not infrequent condition of terms of peace in cases where the issue of the struggle leaves the dominant party in a position to exact this. So, in 1871, Germany, in addition to the cession of Alsace and Lorraine, exacted from France an indemnity of 5,000,000,000 francs (*a*). In some modern wars, however, the successful belligerent has shown greater magnanimity. So, in 1848, the United States took no war indemnity from Mexico, and even made some payment for territory ceded by the latter under pressure of the war (*b*). In 1898, again, the United States exacted no war indemnity from Spain, and even paid to the latter an indemnity in respect to the cession of the Philippine Islands; but no indemnity was paid in respect of Porto Rico, whilst Cuba was not allowed to assume liability for any part of the Spanish debt (*c*). Great Britain in 1902, although this was a case of conquest—not only paid for all requisitions made by the Boer forces, but contributed a sum of 3,000,000*l.* towards other Boer losses (*d*). Where an indemnity is exacted, a part of the territory of the debtor State is sometimes retained in occupation as security for payment.

HOSTILE ACTS DONE IN IGNORANCE OF PEACE.

THE "JOHN."

1818. 2 Dodson, 336; 1853. Moore, Int. Arb. iv., 3163.

Case. By the treaty of peace concluded at Ghent on the 24th December, 1814, between Great Britain and the United States,

(*x*) See p. 223, *ante*.

(*y*) *U. S. v. Arredondo*, 7 Peters, 691.

(*z*) *U. S. v. Rice*, 4 Wall. 254; and see p. 244, *ante*.

(*a*) See vol. ii. 74.

(*b*) In addition to payments to citizens from localities and individuals, which have been estimated at 70,000,000 frs.

New Mexico and California were ceded to the United States on payment by the latter of $15,000,000, and the assumption of certain debts due by the Mexican Government to American citizens.

(*c*) See vol. ii. 75.

(*d*) *Loc. cit.* p. 273.

it was stipulated that immediately after the ratification of the treaty (*a*) orders should be sent out to the forces on either side to cease from further hostilities: and, further, that all "vessels and effects" captured by either party after the times specified by the treaty, ranging from 12 to 120 days, according to the locality of the capture, should be restored (*b*). The "John," an American vessel, was captured by H.M.S. "Talbot" within the twelve day zone, and after the expiry of the period agreed on: both captor and prize being in ignorance of the fact that peace had been concluded. The vessel was, however, soon afterwards lost, whilst under the control of the captor, by the perils of the sea. Some time afterwards a monition was issued (*c*) at the instance of the owners of the vessel, requiring the captor to proceed to adjudication; the object being to make the commander of the "Talbot" personally responsible for the loss. It was, however, held by the Court that in the circumstances of the case the captor could not be held personally liable.

Judgment.] Sir W. Scott, in giving judgment, pointed out that the case for the complainants rested on two grounds: first, on the general right of restitution on a capture made out of due time and place: and, secondly, on an alleged mismanagement of the ship whilst under the captor's control. On the latter point, however, he was of opinion that due care had been shown. The question then remained whether the original possession of the captor was such a possession as would exempt him from liability for consequences not due to his personal default. With respect to this, in the present case, the ignorance was not one of law but of fact, and also of a fact dependent on transactions of State of which the captor could not possibly be aware until it was communicated to him. Hence the possession of the captor in the present case must be treated as a *bonâ fide* possession, with the result that any misfortune occurring to the thing whilst in custody must be deemed to fall on the owner. For this reason he was of opinion that the captor was not personally answerable in the way of compensation for the loss sustained. This did not,

(*a*) This took place on 17th Feb., 1815.

(*b*) Art. 2.

(*c*) See p. 186, *ante*.

however, exclude a liability elsewhere: although whether such a liability lay on the Government was a question that did not then require to be determined.

The Finding of the Joint Commission. Acting, no doubt, on Lord Stowell's suggestion that a liability might conceivably attach elsewhere, the United States Government subsequently made a claim for indemnity on behalf of the owners of the vessel against the British Government; and this, with other claims, was, by a Convention of the 8th February, 1853, referred to a Joint Commission. In the result the Commission reported in favour of an indemnity, which was accordingly paid to the owners of the vessel.

In giving his decision the United States Commissioner, with whose finding the British Commissioner agreed[d], stated, in effect, that the decisions of the British Prize Courts both in the case of the "John" and in that of the "Mentor" went to show that where there was a want of due diligence in advertising the cessation of hostilities the injured party was clearly entitled to indemnification. As it was sometimes difficult to determine what constituted due diligence under the circumstances, it was usual to assign fixed periods for the cessation of hostilities according to the situation and distance of places. The question then was whether, in the present case, the assignment of such periods under the Treaty of 1814 was not designed to establish the times so fixed on as the periods that were to be regarded as "reasonable" for the purpose of "notice." From the language of Art. 2 (*e*), and as it could not be supposed that the parties designed to append to these periods a further indefinite time for giving notice, he concluded that these times were agreed on as equivalent to notice, and that thereafter the obligation to cease from hostilities was imperative. After this, even though collisions might occur without wilful wrong, yet any loss sustained must be fully met. The parties themselves had stipulated that in such a case "all vessels and effects" . . . . "should be restored." This meant not merely that restitution should be

[d] Save on the question of interest, which was referred to the umpire and ultimately allowed. *See*, p. 230.

made of the thing itself if practicable: but that if owing to want of notice a capture was effected, the restitution of which became impracticable, a due equivalent should be rendered in damages. The position had been taken up that however this might be, Great Britain, in the present case, was relieved from this obligation by reason of the vessel having been lost by the act of God. But such a plea could not be set up on behalf of one who was wrongfully in possession *f*. In whatever way the "John" might have been lost, the fact remained that she was taken without right to the place at which she was lost: and, inasmuch as the vessel herself could not now be restored, it followed that such compensation should be made as the nature of the case admitted of (*g*).

Sir W. Scott in his judgment merely decided that inasmuch as the captor had acted in unavoidable ignorance his possession was a *bonâ fide* possession, and that he could not therefore be held personally liable for a loss unattended by negligence; the question of the liability of the Government being left open. Although in such cases the decree of a competent court *may* be judicially conclusive (*h*), yet, if the result of the decision appears to involve a denial of justice or the infraction of some admitted principle, or if (as occurred in the case of *The Anna*) it fails to touch the real issue, then it will be open to the State to which the injured party belongs to prosecute the claim diplomatically. This was accordingly done in the case before us, with the result that the question was, although long afterwards, referred to a Commission. This decided (1) that where certain times are specified for the cessation of hostilities, such times will be presumed to be those within which each Power can reasonably give notice to its commanders of the termination of the war; and (2) that if this is not done, then all captures effected after such times will be regarded as being at the risk of the Government of the captor, and, in the event of loss however occurring, as involving an obligation of indemnity. As regards the personal irresponsibility of the captor however, it needs to be noted that in the case of *The Mentor* (1 C. Rob. 179) where an American vessel had been destroyed by a British captor, in 1783, in ignorance of the restoration of peace, the Court inclined to the

(*f*) Not, indeed, by virtue of his own default, as does the question dealt with by Lord Stowell, but by virtue of the default of his Government, as held by the Commission.

(*g*) For another example of this type of case, see *The Frau Margaretha* (1 C. Rob. 141), which arose out of the war between the United States and Mexico: Moore, Int. Arb. iv. 4398.

(*h*) Being a Court of last resort, or even a Court inferior thereto if the decree is not appealed from.

(*i*) See p. 193.

view that a captor in such a case might be made liable in damages, although if he acted in ignorance he ought to be indemnified by his own Government (*k*).

If no special period is fixed for the cessation of hostilities, then all property captured after the conclusion of peace must be restored when that fact is duly established (*l*). Moreover, even if a special period is fixed, all hostilities and captures should cease when once the fact of peace becomes known: although a naval or military commander is not bound to accept such notice except from his own Government. So, in the case of *The Swineherd* (*m*), where a British vessel had been captured by a French privateer within the five months fixed by the Treaty of Amiens for the cessation of hostilities between Great Britain and France in the Indian seas, but after notice of the peace had been received by the prize, and also by the captor himself although not from an official source, the vessel was condemned on the grounds that the capture was effected at a time anterior to that fixed for restitution by the treaty (*n*), and that the captor had not as yet that authentic and sufficient knowledge of the cessation of hostilities which he was bound to require (*o*). Where a prize has been taken during the war, but recaptured after the cessation of hostilities and in ignorance of the peace, the prize ought strictly to be restored to the captor, even though not previously condemned; for the reason that even the possessory rights of a captor cannot be infringed after the cessation of hostilities (*p*). Some States, however, now incline to the practice of restoring all property which has been taken as prize but not actually condemned at the time when peace is concluded. So, in the case of *The Dee* (*q*), referred to hereafter (*q*), the Italian Courts, although they found the vessel in fault, refrained from pronouncing a decree of condemnation, on the ground that peace had meanwhile been established.

General Notes. *Hostile Acts done in Ignorance of Peace.* When war is terminated by treaty or peace, all acts of hostility are prohibited as from the date of its signature, unless some other time is expressly agreed on (*r*); and this even though the treaty itself may be subject to ratification. Where, as sometimes happens, hostile acts are done in ignorance of the termination of war, they must so far as possible be undone and compensation afforded by the belligerent in

(*k*) Although it was held, in the [illegible] that [illegible] was liable [illegible] against the Admiralty [illegible] sixteen years [illegible] and [illegible] previous suit [illegible] the commander had [illegible] vessel without having been compelled [illegible] 2 Dodl. 100; [illegible] 7 C. Rob. 385; 12 C. Rob. 134.

(*l*) Really the preliminary articles which precede the definitive treaty. See Phill. iii. 779 (*s*), and iv. 234, (*c*).

(*m*) See Phill. iii. 782; and 7 [illegible] of C. Rob. 138, iv. 238.

[illegible] 176.

[illegible] 1 Pistoye [illegible] 118).

default. So territory occupied or places taken or captures made thereafter must be restored; prisoners taken must be released; and contributions and requisitions exacted, even though by way of arrears, must be repaid. When hostilities extend to distant regions, with which communication may be difficult, it was formerly the practice to fix on some future date, or even different dates for different regions, at which hostilities should be brought to a close; but owing to modern facilities of communication, such cases are scarcely likely to occur in the future (*s*). In such a case, however, if hostilities should occur or a capture be made after the time or times agreed on, the State to which the aggressor or captor belongs will be responsible to the extent of an adequate indemnity. Moreover, if, even before the expiry of the period or periods agreed on, authentic notice reaches a naval or military commander, it is now commonly agreed, in spite of some previous divergence of opinion, that he ought to abstain from further acts of war. This, however, is subject to the reservation that he is not bound to accept such notice unless it comes to him directly or indirectly through his own Government; a reservation which sometimes operates harshly (*t*), but which is at bottom not unreasonable, having regard to the serious consequences that might attend the suspension of warlike operations on information that was erroneous or intentionally deceptive (*u*).

THE LEGAL EFFECTS OF CONQUEST AND ANNEXATION.

(i) AS REGARDS PROPERTY AND OBLIGATIONS.

THE REPORT OF THE TRANSVAAL CONCESSIONS COMMISSION.

[Parliamentary Papers, 1901, South Africa, Cd. 623.]

The Appointment of the Commission. In August, 1900, the British Government, believing the war with the South African Republic to be nearing its end, began to consider the question of its responsibilities as the successor of the Republic in the event of annexation. Already, on the 19th March, 1900, a notification had been issued by the High Commissioner to the effect that the British Government would not recognize as valid any alienation of property, whether of lands, railways, mines or mining rights,

(*s*) But see the cases of the *Saxonia*, p. 233; *Schooner Adeline*, 5 Cranch, 226; *Schooner Peggy*, 1 Cranch, 103; *Hobart*, 2 Hagg. Adm. 100; *Phoebe*, 1 Hagg. Adm. 354; *Ann Green*, 1 Gallison, 274; *Rose*, 4 Wheaton, 239; *Nancy*, 3 Wheaton, 110; *Commercen*, 1 Wheaton, 382; *Hiawatha*, 2 Wallace, 148; *Protector*, 12 Wallace, 700; *Grotius*, 9 Wallace, 129; *Ambrose Light*, 25 Federal Reporter, 408; *Alexander*, 1 Wallace, Jr., 191; *Rapid*, 8 Cranch, 155; *Admiral Kingsley*, 2 Sprague, 179; *Lilla*, 2 Sumner, 1; *Amy Warwick*, 2 Sprague, 123; *Circassian*, 2 Wallace, 135; *Peterhoff*, 5 Wallace, 28; *Springbok*, 5 Wallace, 1; *Stephen Hart*, 2 Sprague, 131; *Admiral*, 3 Wallace, 603; *Ambrose Light*, 25 Federal Reporter, 408; *Science*, 2 Lowell, 484; *Circassian*, 2 Wallace, 135; *Gray Jacket*, 5 Wallace, 370; *Admiral Kingsley*, 2 Sprague, 179; *Hiawatha*, 2 Wallace, 148; *Ambrose Light*, 25 Federal Reporter, 408; *Peterhoff*, 5 Wallace, 28; *Springbok*, 5 Wallace, 1; *Stephen Hart*, 2 Sprague, 131; *Admiral*, 3 Wallace, 603

made by the Transvaal Government after the date of the proclamation; and this notification was repeated in September, 1901. In August, 1900, a Commission (*a*) was also appointed to enquire into and report on the various concessions which had been granted by the Transvaal Government; the settlement of this question being one in which both British subjects and foreigners were largely interested. On the 1st September, 1900, a proclamation was issued annexing the territory of the Republic; a proceeding which, although in the circumstances premature, was nevertheless validated by the ultimate issue of the war. On the 8th September a special notification was issued, to the effect that all concessions granted by the Transvaal Government would be considered on their merits; but that the British Government reserved its right either to refuse recognition to or to modify such concessions as might prove to have been beyond the power of the Transvaal Government having regard to any agreement or convention with Great Britain, or to have been granted without legal authority or contrary to law, or the conditions of which had not been duly complied with, or which might appear to conflict with the public interest. The Commissioners appointed subsequently proceeded to South Africa, and after due enquiry into the various matters referred to them, issued their report on the 19th April, 1901.

The Report: i *Statement of Principles*. The Report commences with a statement of principles, which the Commissioners regarded as applicable to the problem before them in the circumstances of the annexation, and which are to the following effect: 1. "It is clear that a State which has annexed another State is not legally bound by any contracts made by the State which has ceased to exist, and that no Court of law has jurisdiction to enforce such contracts if the annexing State refuses to recognize them (*b*). But the modern usage of nations has tended in the direction of the acknowledgment of such contracts. After annexation, it has been said, the people change their allegiance,

(*a*) The Commissioners consisted of Mr. A. M. Ashmore, Mr. R. K. Loveday, and the Hon. A. Lyttelton.

(*b*) *Cook* v. *Sprigg*, 1899, A. C. 572.

but their relations to each other and their rights of property remain undisturbed (*c*) : and property includes rights which lie in contract (*d*) . . . . Concessions of the nature of those which are the subject of enquiry present examples of mixed public and private rights : they probably continue to exist after annexation until abrogated by the annexing State (*e*) ; and, as a matter of practice in modern times, where treaties have been made on the cession of territory they have often been maintained by agreement (*f*). In considering what the attitude of the conqueror should be towards such concessions, we were unable to perceive any sound distinction between a case where a State acquires part of another State by cession and a case where it acquires the whole by annexation. The opinion that in general private rights should be respected by the conqueror, although illustrated and supported by jurists by analogies drawn from the Roman law of inheritance, is based on the principle, which is one of ethics rather than law, that the area of war and suffering should be, so far as possible, narrowly confined, and that non-combatants should not, where it is avoidable, be disturbed in their business. And this principle is at least as applicable to a case where all as where some of the provinces of a State are annexed." (2) "Though we doubt whether the duties of an annexing State towards those claiming under concessions or contracts granted or made by the annexed State have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilized practice, as to warrant their being termed rules of international law, we are convinced that the best modern opinion favours the view that as a general rule the obligations of the annexed State towards private persons should be respected. Manifestly the general rule must be subject to qualifications : as that an insolvent State could not by aggression which practically left to a solvent State no other course than to annex it, convert its worthless into valuable obligations : that an annexing State would be justified

(*c*) *Yates v. Pyeatt*, 7 Pet. 51.

(*d*) *Soulard v. U. S.*, 4 Pet. 511 : *Grotius*, 2, 378 ; and Halleck, c. 34.

(*e*) Upon Spanish concessions, see Hall, Appendix, No. [illegible] *Peru*.

(*f*) *E.g.*, Prussia and Netherlands, 1816; Peace of Zurich, 1859; France and Sardinia, 1860; Peace of Vienna, 1864; Cession of Venetia, 1866; Germany and France, 1871; Great Britain and Germany, 1890.

in refusing to recognize obligations incurred by the annexed State for the immediate purposes of war against itself; and that probably no State would acknowledge private rights the existence of which caused or contributed to cause the war which resulted in annexation." (3) "Subject to these reservations, H.M. Government, in dealing with the concessions in question, will probably be willing to adopt the principle, which, in the case of the annexation of Hanover by Prussia (the modern case most nearly corresponding with that under consideration—was proclaimed by the conquerors in the following terms: 'We will protect every one in the possession and enjoyment of his duly acquired rights'" (*g*). (4) "The acceptance of this principle clearly renders it necessary that the annexing Government should in each case examine whether the rights which it is asked to recognize have, in fact, been duly acquired. It is an obvious corollary that the rights in question must be valid, not only by reason of due acquisition in the first instance, but by reason of their conditions having been subsequently duly performed." (5) "Applying these principles more in detail to the case of the concessions with which we have had to deal, we have come to the conclusion that the cancellation of a concession may be properly advised when (a) the grant of the concession was not within the legal powers of the late Government; or (b) was in breach of a treaty with the annexing State; or (c) when the person seeking to maintain the concession acquired it unlawfully or by fraud; or (d) has failed to fulfil its essential conditions without lawful excuse; cancellation or modification in these cases being justifiable without compensation, in the absence of special circumstances." (6) "We further think that the new Government is justified in cancelling or modifying a concession when the maintenance of the concession is injurious to the public interest." (7) "In the last case, however, the question of compensation arises. On the question of compensation the Commissioners, while [illegible] consent payable to be within the scope of their enquiry, subject [illegible] cases where a concession was cancelled or modified [illegible], in the view of the new Govern-

(*g*) Cf. Sess. Papers, H.C. 11, 2nd October, 1866.

ment, injurious to the public interest, regard should be paid to the question whether the grantee at the time of the grant knew or ought reasonably to have known that it was precarious, more especially as being closely related to large and changing public interests; (b) that in assessing compensation the value of the interest should be taken as it was before the war, the grantee not being entitled to benefit by any appreciation in value derived from the superior credit and stability of the new Government; (c) but that due consideration ought properly to be shown in cases where a new or hazardous enterprise has been pioneered into stability in an unsettled and undeveloped country."

(ii) *Assets passing on annexation.*—The Report also comprises a schedule of assets belonging to the Transvaal Government, and arising out of concessions, shares in companies, and claims to participate in profits, which were assumed to devolve on the new Government.

iii. *Conclusions with respect to particular concessions.* The Report further deals with some twenty-five concessions, coming under the category of (1) railways and tramways not purely municipal; (2) manufacturing and trading concessions; and (3) concessions of rights of a municipal character. As to some of these the Commissioners recommended a full recognition of the concession; as to others, a modification either on terms suggested or to be arranged; and as to others, again, a complete or partial cancellation either without compensation, or with compensation only of particular interests, or an expropriation on a reasonable basis. The following will serve as examples of the modes of treatment accorded:

1. **The Netherlands South African Railway.** This was a concession owned by a company incorporated in Holland, under which the company enjoyed what was, in effect, an exclusive right to construct and work all main lines in the Transvaal. The cancellation of the concession was recommended on the grounds (a) that the company, through its local managers and agents, and with the approval of the Dutch board of directors, had actively identified itself with the Boer cause during the

war, and had committed acts of aggression against the British which were warranted neither by the terms of its concession, the character of its undertaking, nor by its local subjection to the authority of the Transvaal Government (*h*); and (b) that the grant of a wide-reaching monopoly of this character was injurious to the public interest, and especially so when the grant was to a foreign corporation (*i*). In the opinion of the Commission, the shareholders, who were ultimately responsible for the action of the directors and officials, were not entitled to compensation on forfeiture except as a matter of grace; but the debenture holders, who were neither responsible for nor privy to the acts complained of and whose interests had been guaranteed by the Transvaal Government, were thought to be entitled to a recognition of their rights, although with some allowance for the improvement of their security in consequence of the new *régime*. In the result this concession was cancelled. At the same time the British Government assumed the entire liability as regards the debentures; whilst it also agreed—notwithstanding the recommendations of the Commission—to pay a full indemnity (*k*) to shareholders who had acquired their interests prior to the outbreak of war, excluding only shares that belonged to the Transvaal Government and to the managers or agents of the company (*l*).

(2) **The Prætoria-Pietersburg Railway.**—This was a line held and worked under a concession vested in an English company; the Transvaal Government owning three-fifths of its shares, but being also guarantor of the debenture interest and of a limited

(*h*) Its manager had, it was said, acted as guide and counsellor of the enemy Government in connection with the war; it had facilitated the employment of the members of its staff in purely military operations against the British; it had made arms and ammunition for the Government; it had destroyed bridges in British territory; and it had further sought to disguise its action by inducing the Government to exercise a pretended coercion over it. See Report, 23, 28, 30, 35.

(*i*) The forfeiture was also justified on the analogy of the forfeiture of neutral vessels engaging in the enemy service: see p. 456, *infra*.

(*k*) Amounting to 135*l*. per share.

(*l*) As a matter of fact, nearly all the shares, with the exception of some 500 out of 14,000, appear to have been paid for: the 5,713 shares of the Republic having found their way into neutral hands. For a criticism of the report of the Commission and the action of the British Government, see Barclay, Problems, 19 *et seqq.*; although it is conceived that such action was really justified, both in principle and by virtue of analogous practice: *ante*, p. 241-2.

dividend on the shares issued to the public. The concession was reported to have been lawfully acquired and honestly carried out. Although the line had been used for the purposes of the war, this was the act and within the right of the Transvaal Government. In the result, the British Government, having taken possession of the shares originally subscribed by the Transvaal Government, under an order of the Courts, recognized the concession and assumed all the liabilities of the prior Government under its guarantee.

3 **The Dynamite Concession.** In 1893 the manufacture and sale of explosives in the Transvaal was declared to be a Government monopoly, but with power to the Government to transfer its rights to other persons. The monopoly was at the time intended to be and was in fact assigned to a grantee, and ultimately became vested in the Transvaal Dynamite Company, which was itself controlled by a German combination. As to this the Commission found in effect that the Company had violated the conditions of its contract, which was itself in breach of the regulations made by the Raad; and that, although the breach of conditions had been condoned by the Government and Legislature, yet this result had been achieved by corrupt practice and bribery. On this ground, as well as on the ground that such a monopoly was opposed to the public interest, the Commission recommended the British Government to refuse to recognize the concession, which was accordingly cancelled.

Despite its shortcomings, the Report of this Commission, and the [illegible] by the British Government thereon, will probably [illegible] an international precedent of some importance for the [illegible] of debts and liabilities [illegible] on transfer of territory. In the *West Rand Central Gold Mining Co.* v. *The King*, 1905, 2 K. B. 391, it was held, as we have seen, that the conquering State, in such cases, incurred no liability for the obligations of its predecessor. The assumption of such obligations being entirely a matter of policy, it is clear that there was no distinction in this regard between debts connected in the ordinary course of administration and obligations incurred specially for [illegible] and yet in such cases obligations become [illegible]

a municipal Court could give effect to (*n*). The Report, whilst purporting to accept the judicial view, nevertheless qualifies this, in effect, by the admission that "the modern usage of nations tends in the direction of the acknowledgment of such contracts" (*o*), and that "the best modern opinion favours the view that as a general rule the obligations of the annexed State towards private individuals should be respected;" basing this, however, on political or ethical rather than on legal grounds (*p*). On the whole this bears out the view previously suggested, that there is a doctrine of succession which is broadly accepted in practice, although the rules which govern its more particular applications are still in course of growth. The Report, it will be seen, also affirms the view that in the matter of succession there exists "no sound distinction between the cases where a State acquires part of another State by cession and where it acquires the whole by annexation;" a statement true at most points, although needing some qualification (*q*). Equally important is the recognition by way of exception to the general rule—that a conquering State is not liable for obligations contracted by its predecessor for the purposes of the war; a distinction denied by the English Courts (*r*), but now generally accepted (*s*).

For the rest, the statement of the Commissioners is directed more particularly to the question of "concessions." These are contractual rights of a special kind, involving the grant by public authority to individuals or corporations of some right or privilege not otherwise exerciseable; such as a right to construct works, railways or tramways, or to establish undertakings for the supply of gas, water or electricity, or to carry on some special industry under conditions not available to the public. The principles laid down with respect to the treatment of these rights in cases of conquest or cession will, from their reasonable character, probably command a general assent (*t*).

The forfeiture of the concession of the Netherlands South African Railway Co. in itself also constitutes a precedent of no little importance. The use of the line and material of the company, on the requirement of the territorial Power and in aid of its operations during the war, would have rendered all property so employed liable to seizure or destruction; but it would not, in itself, have constituted a ground for the subsequent forfeiture of the concession. In the case in question, however, the company, notwithstanding its neutral character, had pursued through its local officials and with the

See also *Cook* v. *Sprigg* (1899, A. C. 572; but for a criticism of this view, see Westlake, i. 81 *et seq.*; and for a judicial recognition of the right of succession, *U. S.* v. *McRae*, L. R. 8 Eq. 69; and *U. S.* v. *Smith*, 1 Hughes R. 347; Scott, 89).

(*n*) See *ante*, p. 235.

(*o*) See *ante*, p. 236.

(*p*) See vol. i. 74, 75. Such differences as do exist are, for the most part, due to the fact that in the case of complete absorption, there is no other body on whom certain kinds of obligations, such as the general debt, can devolve. See also Hall, 99; Westlake, i. 77.

(*q*) As incident to general denial of a succession: see vol. i. 16.

(*r*) See Westlake, i. 78.

(*s*) See *ante*, p. 237.

assent of the directors, by whose acts the company was bound—a policy of active association with the cause of the enemy and active hostility to the British, going far beyond the requirements incident to its local subjection to the authority of the Transvaal Government (*u*). This virtually constituted such an identification of the company with the enemy cause for the purposes of the war as to justify, on the analogy of unneutral service (*x*), the forfeiture of the undertaking (*y*), although this was in fact only partially enforced (*z*).

(ii) AS REGARDS PERSONS.

THE CASE OF COUNT PLATEN-HALLEMUND.

[1866: Forsyth, Cases and Opinions, 335; Halleck, International Law, ii., 476.]

Case. Count Platen-Hallemund was Prime Minister of Hanover in 1866, at the time of the outbreak of the war between Austria and Prussia, in which Hanover sided with the former. In the course of the war, the Hanoverian army was forced to capitulate and the King put to flight, whilst Hanover itself was ultimately annexed by Prussia: the annexation having been confirmed by the Treaty of Prague, 1866. Prior to the annexation Count Platen-Hallemund had left Hanover in the suite of the King, and ultimately took up his abode in Vienna. Whilst there he was summoned to appear before the Supreme Court of Judicature at Berlin on a charge of high treason, alleged to have been committed by him as a "Prussian subject," although after he had in fact ceased to reside in Hanover. By the law of Prussia, only a Prussian subject can be prosecuted before a Prussian Court for an act of high treason committed abroad: and the jurisdiction of the Court therefore depended on whether he had become a Prussian subject by virtue of the annexation of Hanover to Prussia. At the trial Count Platen-Hallemund did not appear

(*u*) As to which, see vol. i. 203.

(*x*) *Ibid.* p. 456.

(*y*) This conclusion would also appear to be borne out by the provisions of H. C., No. 5 of 1907, Arts. 17, 18. Nor would the provision contained in Art. 17 appear to protect from confiscation property in the situation described. Great Britain, moreover, signed under reservation of Arts. 16–18. But see *e.g.* Barclay, Problems, p. 49.

(*z*) By cancelling the concession, but with compensation to shareholders: see p. 239, n. (*z*), *ante*.

in person, but took exception by his counsel to the jurisdiction of the Court, and cited in support of this plea the opinions of two eminent German jurists, Professor Zachariæ of Göttingen and Professor Neumann of Vienna, to whom the question had been submitted. This plea was, however, overruled, with the result that the accused was convicted and sentenced in his absence to fifteen years' penal servitude.

Opinion. In effect, the opinion of Professors Zachariæ and Neumann was—that the mere fact of conquest and annexation did not of itself create the relation of Sovereign and subject between the conqueror and the conquered; and that to create such a relation there must be either an express or tacit submission. At the same time it was pointed out that "tacit submission" would include remaining within the sphere of the power of the new dominion and fulfilling the duties of a subject. Subject to this proviso, it must be left entirely to the choice of the subjects of the subdued State whether they would acknowledge the new sovereign Power or not. Consequently they were at liberty to emigrate if they chose; but if they remained, then they tacitly declared that they entered the new State, and hence became subjects thereof.

The opinion given in this case appears to embody a correct statement of the existing law. The doctrine of an absolute and unconditional transfer of allegiance by the mere fact of conquest no longer obtains, and the express or implied consent of the subject may now be regarded as essential to the creation of the new tie of personal allegiance (*a*). In 1869 even the German Government appears to have recognized this in the case of certain persons, formerly citizens of Frankfort, who after the annexation of that city by Prussia had withdrawn and become naturalized in Switzerland, but had subsequently returned to Frankfort. In these circumstances, the Government—instead of holding them to the allegiance and obligation of military service which, according to the preceding doctrine, would have resulted from annexation, and from which naturalization elsewhere without its consent (*b*) would not have exempted them—contented itself with merely expelling them from its territory (*c*). And the same principle despite some opinion to the contrary—appears to be deducible from the English

(*a*) But see Hall, 567, n.
(*b*) See vol. i. 193.
(*c*) See Hall, 237; Westlake, i. 70.

and American decisions on this subject (*d*). The principle is, moreover, equally applicable in the case where only part of a State is conquered and annexed. But in such a case it is usual, by the treaty of cession, to reserve to the nationals of the conquered territory either a right to elect for their former nationality, subject to withdrawal, but with a right to retain or dispose of their property (*e*); or, more often, a right to elect for their former nationality, without withdrawal, on complying with certain conditions (*f*). With respect to the classes of persons to whom this right, whatever its scope, will be available, the practice appears to vary. Under some treaties, the right of election is determined by nationality of origin: under others, by residence or domicile; whilst under others, again, it is extended both to nationals and domiciled inhabitants (*g*). The status both of the territory annexed and of such of its inhabitants as do not withdraw or otherwise elect for their former nationality, will depend entirely on the municipal law of the conqueror, subject to the considerations mentioned hereafter (*h*). But the status of the subjects of neutral States who may be domiciled or resident in that territory will not be affected, except, of course, in so far as the temporary and local obedience which they owe to the territorial Power will now be rendered to a new authority.

General Notes.—*Title by Conquest* (*i*).—In order that a State may acquire a legal title to territory which it has conquered, it is

(*d*) See *Doe* d. *Thomas* v. *Acklam* (2 B. & C. 779); *Doe* d. *Auchmuty* v. *Mulcaster* (5 B. & C. 771); *In re Isaac* (1 L. J. N. S. Ex. 153); Halleck, ii. 474; but, *contra*, Hall, 565. In *U. S.* v. *Repentigny* (5 Wall. 211), indeed, it was held that on the conquest and annexation of a country, inhabitants who leave and adhere to their former Sovereign forfeit the right to protection both as regards themselves and their property, unless protected by treaty; and that if it is provided by treaty that they may sell their property within a certain time and under certain conditions, then a failure to comply with these conditions will work a forfeiture; although, in fact, the forfeiture in this case appears to have been based on the non-fulfilment of conditions attaching under the original grant.

(*e*) Such a right was conceded by the Treaty of Frankfort, 1871, to the natives and inhabitants of Alsace and Lorraine, on the cession of those provinces to Germany.

(*f*) So, on the cession of Mexican territory to the United States in 1848 by the Treaty of Guadalupe-Hidalgo, Mexican subjects established in the ceded territory were allowed to retain their national character without withdrawal on declaring that intention within one year. Again, on the establishment of Cuban independence, by the Treaty of Paris, 1898, Spaniards resident in Cuba were allowed to retain the Spanish character without withdrawal, but on registration. By the Treaty of Portsmouth, 1905, Russian subjects, resident in territory ceded to Japan, were allowed either to sell their landed property and withdraw, or to remain with full protection on submitting to the Japanese laws and jurisdiction: *v. infra*, p. 224.

(*g*) See Hall, 567, n.: and Westlake, i. 72.

(*h*) See p. 248, *infra*: Halleck, ii 480, 482.

(*i*) As to a proposal made in 1890 to abolish title by conquest under the public law of America, see Moore, Digest, vii. 315.

necessary that there should be either a "cession," express or implied, on the part of the dispossessed State; or else a "completed conquest" in the sense described below. Where conquest affects only part of the territory of a State, the title of the conqueror is almost invariably confirmed by a treaty of peace. This may operate either expressly and by way of cession; or impliedly and by virtue of the principle of *uti possidetis* (*k*); the title resting in either case on treaty rather than on conquest. But where the conquest affects the whole of the territory of a State, and involves consequently an extinction of the former Power, then for want of some ceding authority the title will depend on conquest alone. For this it is necessary that there should be "firm possession" on the part of the conqueror, coupled with "intention" and "ability" to hold the territory so acquired. In such a case "firm possession" will be shown by the effectiveness of the conqueror's military occupation and control. An "intention to retain" will usually be manifested by some formal proclamation or notice of annexation. But such a proclamation cannot rightly be made unless and until the conquest has been completed. If made prematurely it may indeed be validated by the ultimate issue of the war; but, even so, it will not justify the conqueror in treating authorized resistance as treason (*l*). The issue of such a proclamation, moreover, may be important as marking the fact that the actual title to the territory is now in dispute, and that any future grants or concessions must be deemed to abide the issue of the war (*m*). "Ability to retain" will be shown by the complete establishment of the authority of the conqueror, as indicated either by some formal agreement of surrender (*n*), or, at any rate, by the cessation of substantial resistance. It needs to be noticed, however, that even though the resistance of the local forces and inhabitants may have been quelled, the title of the conqueror will not be regarded as complete, or the conquest as definitive, if the war is continued by a third Power in alliance with the subjugated State; or even, it would seem, if it is carried on by a Power not in alliance with the latter, so long as the displacement of the conqueror continues to be one of the objects of the war (*o*). The recognition of the title of the conqueror by other States will depend on much the same considerations (*p*); although in this case some interval of time must necessarily be conceded in order to enable neutral Governments to weigh the facts of the new situation and to judge of its probable permanence (*q*).

(*k*) *Supra*, p. 228.

As is alleged to have been done by Italy in the recent annexation of Tripoli. In an "occupied" district, of course, spontaneous risings or unauthorized resistance may be treated as penal: *supra*, p. 100.

(*l*) See *Hoyt et al. v. Gelston*, 12 Wheat. 523, where it was held that all grants of contested territory made during the war by the party that failed must be regarded as invalid, unless confirmed by treaty.

(*m*) Such as the compact of Vereeniging, 1902: see p. 226, *supra*.

(*n*) As to the case of Genoa in 1815, and the dispute to which it gave rise, see Hall, 184 *et seq.*

(*o*) See vol. i. 68.

(*p*) On the subject generally, see Halleck, ii. 467, 471.

Succession in Cases of Conquest.—The question of succession in general has already been discussed (*r*). It remains only to consider it with special reference to conquest. If, as has been suggested, a doctrine of succession as between States is already broadly recognized even though the rules governing its particular application are still unsettled (*s*), it would seem that conquest affords one of its most appropriate instances. The legal consequences of conquest, touching as they do both on internal and external relations, must, if they are to be orderly and intelligible, rest ultimately on some basis of principle, and the choice here appears to lie between two alternatives. One of these is to regard the rights of a conqueror as resting solely on force, as in the ordinary conduct of war. This is the view which is, no doubt, reflected in the English decisions (*t*). Nevertheless, it is at bottom unsatisfactory, both as involving a complete dislocation of the ordered life of the community, and as failing to recognize the necessary association of obligations with benefits as regards the position assumed by the conqueror. Nor is it in harmony with modern opinion or recent practice (*u*). The other is to regard the rights and liabilities of a conqueror as governed broadly by the principle of succession (*x*), although with some qualifications incident to the particular situation. This has the merit of securing, in legal theory, at any rate, a continuation of the ordered life of the community, save in matters essential to the security of the conqueror (*y*); of recognizing that obligations pass with rights; and of requiring the conqueror to assume them, at any rate to the extent of assets which he has received (*z*). This view is also more in harmony with the trend of modern usage (*a*). From the point of view, then, both of principle and practice, so far as the latter extends, it would seem that the rights and liabilities of a conqueror are referable broadly to the principle of succession. If this be so, the conquest and annexation by one State of the whole or part of the territory of another will carry generally those rights and liabilities, whether as regards persons, property, or engagements, which have been previously indicated as attending a "full" or a "partial" succession, as the case may be (*b*). Nevertheless, in the case of conquest, the application of this principle is, on its passive side, at any rate, subject to certain qualifications, although these are by no means well defined.

Qualifications. In the first place, it would seem that the con-

(*r*) See vol. i. 71 *et seq.*

(*s*) *Ibid.* 72.

(*t*) See *West Rand Central G. M. Co.* v. *Rex* (1905, 2 K. B. 391) and *Cook* v. *Sprigg* (1899, A. C. 372, but see also 578); and vol. i. 18, 71.

(*u*) See vol. i. 72.

(*x*) Based no doubt on the analogy of civil succession, as recognized not only in cases of heirship but also in cases of bankruptcy and forfeiture.

(*y*) See the Prussian precedent referred to, p. 237, *supra*.

(*z*) For instances in which this principle has been asserted internationally, see a claim by the United States against Chile in 1883, Wharton, Dig. i. 348; and the claims of the Boer Generals, Parl. Papers, 1901 (Cd. 663), p. 3, and 1902 (Cd. 1329), p. 7.

(*a*) See vol. i. 71–73.

(*b*) *Ibid.* 72 *et seq.*

quering State is not bound to recognize or discharge obligations of the preceding Government, which were incurred for the immediate purposes of the war; for the reason that a State cannot, in the circumstances, be expected to assume—and hence to facilitate the making of obligations entered into with a view to its own injury or overthrow (*e*). But the precise scope of this qualification is far from clear. It would clearly cover loans of money, and obligations for war material, contracted after the outbreak of war. In strictness, it would also appear to extend to obligations or *quasi* obligations incurred by the displaced Government, during the war, in respect of the levy of money or supplies, or other subjects of indemnity under the domestic law (*d*); but, in cases of cession, obligations of this kind are often expressly assumed by agreement (*e*), whilst, in the case where the whole of a State is annexed, they are often assumed as a matter of grace (*f*). In the second place, it is probable that a conquering State would not now acknowledge private rights or obligations that had caused or contributed to the war; for the reason that these must be deemed to have been put in issue by the war and the issue to have been decided against the party that failed (*g*). Nor, finally, is it likely that a solvent State would now feel bound to assume to the full the obligations of an insolvent State which it had annexed. In such a case it would seem that, both in equity and under the law of succession in its developed form, the liability of the conqueror is limited by the material assets actually received by him; these being estimated, generally, by the net revenue-producing capacity of the territory acquired, on a fair basis of taxation and expenditure (*h*). Great Britain, however, in 1902, virtually took over the whole of the debts of the conquered States, including a deficit of the South African Republic amounting to some £1,500,000. Subject to these qualifications, the annexing State will be bound by all the obligations of the preceding Government, whether incurred

(*e*) For an analogous case, see vol. i. 79; and, as to the refusal to allow Cuba to take over debts contracted for the maintenance of the Spanish rule, *ibid.* 73.

(*d*) As regards contributions and requisitions proper, it seems that, in the former case, a moral obligation, and, in the latter, a legal obligation at any rate as regards supplies in kind will devolve on the annexing State.

(*e*) As on the cession of Lombardy in 1859, and Venetia in 1866; although the Italian Courts appear to have regarded them as devolving on the Italian Government irrespective of treaty: see Westlake, i. 79.

(*f*) So, on the conclusion of the South African war, Great Britain provided a sum of £3,000,000 for the purpose of indemnifying the inhabitants for losses sustained in war, including all requisitions for which notes or receipts had been given by the authority of the preceding Government: whilst further payments were made in respect of property which had been commandeered or destroyed. See pp. 273, 274, *infra*.

(*g*) As in the case of a treaty which led to war: see p. 228, *supra*; and Hall, 383, 557.

(*h*) See Westlake, i. 77, where this principle is fully developed: and as to cases where the territory annexed is endowed with domestic autonomy, vol. i. 75, and Opinions of U. S. Att.-Gen. xxii. 585 *et seq.*

in the course of administration or as incident to its business undertakings; but it will not be bound by obligations arising out of tort, or by those which were merely personal to the former Sovereign, or by treaties or political obligations other than such as were locally connected with the territory annexed (*i*). It will, on the other hand, be entitled to all the public property of the conquered State, even though situated in foreign countries, such as monies lodged with foreign banks, or ships lying in foreign ports; but not to property personal to the former Sovereign, unless legally forfeited and duly converted to the public use (*k*).

The Effect of Conquest on Private Rights and Laws. With respect to private rights, conquest and annexation are now generally understood not to affect either private rights or private property, to whomsoever belonging, in the conquered territory (*l*); although the property of those who continue in active hostility may of course be dealt with as the law may warrant. With respect to the effect of conquest on the local laws and institutions, although the political system, or such part of it as is inconsistent with the public interest or policy of the annexing State, may be changed, yet laws regulating private rights and relations are presumed to be unaffected by the fact of conquest, except in so far as they will now depend on a new authority, by which of course they may be changed in the ordinary course of legislation (*m*). And even though a new judicial system may be established, this will not in general be allowed to affect judgments, decrees, or sentences previously given or passed (*n*). Over and above these customary restrictions, moreover, there is also a moral obligation incumbent on the conquering State to administer the conquered territory, in so far as this may consist with its own safety, in such a manner as to mitigate the sufferings and restore the prosperity of its inhabitants, and to distribute so far as possible over the population at large the burden of losses that have fallen on individuals.

POSTLIMINIUM.

THE CASE OF THE ELECTOR OF HESSE-CASSEL.

1814–1831; Phill. iii., 841—851; Halleck, ii., 496—499.

Case. During the war between France and Prussia, in 1806, Hesse-Cassel, although professedly neutral, was invaded and

(*i*) See vol. i. 75.

(*k*) See p. 253, *ante*; and *Windsor* v. *U. S. Co.* 7 Jur. N. S. 350. The effect of conquest on allegiance has already been considered: see vol. i. 70; and p. 243, *supra*.

(*l*) In the United States this has been enunciated as a judicial doctrine: see *U. S.* v. *Percheman*, 7 Pet. at 87; *Soulard* v. *U. S.* 4 Pet. 511); *Strother* v. *Lucas*, 12 Pet. 410; *Johnson* v. *McIntosh*, 8 Wheat. 543; *The Chicago, &c. Ry. Co.* v. *McGlinn* (114 U. S. 542).

(*m*) *The African Gold Recovery Co.* v. *Hay* (1904, 1 Ch. 438).

occupied by French troops, and the Elector expelled. Prior to his expulsion the Prince had held in the territory of which he was Sovereign extensive domains as his hereditary property, and had also lent out large sums on mortgage both in his own and other German States. Hesse-Cassel remained for about a year under the immediate government of Napoleon; but was thereafter virtually (*a*) incorporated into the newly-formed kingdom of Westphalia, of which Jerome Bonaparte was recognized as King by the treaties of Tilsit and Schönbrun. On such incorporation it was agreed between Jerome and Napoleon that half of the private domains of the Prince should be retained by Napoleon for his own purposes; and, as regards debts due either to the Prince or province, that such of these as were due from persons resident within the territory of Westphalia should be payable to Jerome, whilst such of them as were due from persons resident outside, should be payable to Napoleon, as the original successor in title to the Elector. Under this arrangement various parts of the Elector's hereditary domains were alienated, and taken over by purchasers on the faith of the new title. The payment to Jerome of debts owing by persons within the kingdom was enforced; whilst Napoleon also succeeded in obtaining payment from debtors who resided in other States, although, often, only by remitting a part of the debt and giving a release for the whole. In the latter class of cases, however, the difficulty presented itself that where a mortgage had been officially recorded it could only be validly discharged by entry duly made with the consent of the actual creditor. Of this kind was a debt due from Count von Hahn, the owner of large estates in the duchy of Mecklenburg, who had borrowed money from the Elector on the security of certain mortgages which were duly recorded in the proper office at Mecklenburg. At the instance of Napoleon, and in order to enable the payment of this debt to him, the Duke of Mecklenburg, in 1810, issued a rescript which, after reciting the acquisition by Napoleon of the sovereignty of Hesse-Cassel and incidentally of a right to the debts due to that sovereignty, directed the local Court to record as extinguished any mortgages

(*a*) That is, with the exception of certain districts.

in favour of the Elector Hesse-Cassel for which a discharge should be given by Napoleon or his representative. Relying on this, Count von Hahn paid over to Napoleon a part of the debt due to the Elector of Hesse-Cassel and received a release for the whole, whereupon the mortgage was entered as discharged (*b*).

In 1813 the Elector of Hesse-Cassel was restored to his dominions; his title being confirmed and guaranteed by various treaties. Upon his restoration he claimed to be restored *jure postliminii* to all his former rights, and refused altogether to recognize the validity of transactions entered into by the intermediate Governments.

With respect to the alienation of his domains, he claimed, in effect, that by virtue of the *jus postliminii* he had on his restoration been remitted to his original position, with the result that all his prior rights reverted notwithstanding any dispositions purporting to have been made by the transient conqueror. The purchasers of these lands were accordingly deprived of possession, often by force; whilst the local Courts were prohibited from taking cognizance of the matter. The ousted proprietors, indeed, appealed to the Congress of Vienna, and thereafter to the Diet of the Germanic Confederation, but without result. Nevertheless, juridical opinion was in general opposed to the action of the Elector: for the reason that even in its application to private relations the *jus postliminii* did not extend to property which had been meanwhile transferred to a third party, whilst in its application to public relations it was not deemed to extend to a case where the occupation of an invader had been converted into conquest, and where the title of the conqueror had been confirmed by treaty or by the acquiescence of the inhabitants and by the recognition of foreign Powers (*c*).

With respect to the debts, it appears to have been held by the Courts, even in Hesse-Cassel itself, that those subjects of the King of Westphalia who had paid their debts either to him or to his exchequer and had received due discharges could not be called on to pay such debts anew. The question, however, of the validity of the release given to Count von Hahn, who was not a Westphalian

(*b*) Although the entry was accompanied by a minute setting forth the special circumstances.

(*c*) See Phill. iii. 786, 848, 850.

subject, gave rise in the events that happened to a long judicial controversy. After the Count's death his affairs were found to be embarrassed and his estate was assigned for the benefit of his creditors. Amongst these was the Elector of Hesse-Cassel, who put in a claim for the amount of his original advance, on the ground that the payment to Napoleon was invalid and the discharge of the mortgage therefore illegal. This question was referred by the Mecklenburg Court to various German universities, which at that time were often resorted to as judicial tribunals in matters where the interests of two or more States or their subjects were concerned. The first of these tribunals decided, in effect, that the Elector was entitled to recover only such portion of the debt as had not been actually paid to Napoleon (*d*). Both parties being dissatisfied, an appeal was thereupon taken by consent to a second tribunal, which, in substance, confirmed the judgment of the first. From this decision, again, an appeal was taken, with the sanction of the Mecklenburg Court, to a third tribunal, which decided, in effect, that all debts for which discharges had been given in full by Napoleon were validly and effectually cancelled, and this whether the whole sum had been paid or not; and that the debtors could not therefore be compelled to pay a second time.

The Grounds of the Decision. In the judgment last given the real question was stated to be—whether Napoleon had or had not become the actual creditor of the Hesse-Cassel funds, as successor in title by virtue of conquest to the prior Sovereign. As to this, a broad distinction was drawn between the acts of a transient conqueror in military occupation and acts done after the conqueror had subjugated the country and had been accepted as its ruler. In the former case his rights depended on occupation; in the latter his acts became the public acts of the State. Napoleon's title was of the latter kind. Nor did it matter that these funds were the private property of the former Sovereign. The Elector had remained an active enemy of the Government established by Napoleon, and by the laws of all countries the property of such a person was subject to confiscation (*e*). Napoleon had been the

(*d*) [illegible], p. 219. (*e*) [illegible], p. 215.

original conqueror and had merely transmitted some part of his rights to Jerome, reserving, however, expressly the rights in question. The doctrine that the Elector, by reason of his having retained the instruments containing the acknowledgments of the debtors, must be deemed to have retained constructive possession of the debts, was rejected as untenable. Dealing generally with the question whether the restoration of peace would not work a *restitutio in integrum* with respect to those who had been dispossessed by the war, it was held that even if this were so, a restored owner was bound to take the property as he found it and could not claim to have replaced what was gone. In the circumstances of the case, moreover, it was impossible to consider the return of the Elector as a continuation of his former Government, for the reason that he had not remained constantly in arms against Napoleon, and had been treated as politically extinct by the treaties of Tilsit and Schönbrun, whilst the new Government on its part had been recognized by foreign Powers.

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This case serves at once to emphasize that distinction between a temporary and a completed conquest, which has already been discussed (*f*); and also to illustrate the application in international law of the doctrine of *postliminium*. This, for our present purpose, we may take to be a legal inference by which territory taken by the enemy is presumed to be restored together with all rights appurtenant thereto to its original ownership if retaken before a complete title has been acquired by the conqueror (*g*). In the judgment finally given it was held in effect (1) that having regard to the cessation of resistance, and more especially to the recognition of the conqueror's government by treaty and by foreign Powers, the conquest by Napoleon must be deemed to have been definitive and his title complete; and (2) that in view of this the *jus postliminii*, with its consequent right to *restitutio in integrum*, did not apply on the Elector's subsequent restoration. Looking to the condition of affairs in Europe at the time, it may perhaps be doubted whether Napoleon's conquest of Hesse-Cassel could strictly be regarded as complete for some considerable time after the original subjugation: for the reason at once that the resistance to Napoleon was continued by Great Britain (*h*), and that the Powers whose recognition was relied on in the judgment were not free agents. Nevertheless, by 1813 the original title may fairly be regarded as having been perfected by lapse of time and acquiescence; with the

(*f*) See *ante*, p. 197. (*g*) *Ante*, p. 256.
(*h*) See *ante*, p. 245, and n. (*e*).

result that what had previously been done, even though prematurely under a claim of conquest, became validated (*i*). And in view of this, the decision arrived at was probably justified in its result, even though not by some of the reasons on which it professes to rest.

It will be noticed that the property appropriated by the Bonapartes was the private property of the Elector. This is explained by the fact that at the time in question the distinction between the Sovereign in his personal and politic capacity was not so clearly drawn as now; with the result that property inhering in the Sovereign was treated for the most part as the property of the State (*k*). At the present time property belonging to a Sovereign in his personal capacity would be treated as exempt from confiscation; although if a displaced Sovereign were to continue in active hostility after the conquest had been completed, it would of course be open to the succeeding Government to confiscate it for treason, if this was warranted by the domestic law (*l*).

General Notes.—Postliminium *in International Law*.—The *jus postliminii* was a doctrine of Roman law under which persons, and, in some circumstances, things, captured by an enemy were, on returning to the territory to which they had previously belonged, deemed to revert to their original status or ownership, on the fiction of no capture having occurred (*m*). This doctrine was subsequently imported into international law by the text writers; becoming, in its new application, a legal inference by which persons, property, and, more especially, territory, captured by an enemy, were presumed to revert to their former condition on the withdrawal of the enemy's control. The doctrine, although it still retains some of its earlier applications (*n*), has now greatly diminished in importance; but it is nevertheless noteworthy as having provided a mode of thought by which some of the earlier rules of the *jus belli* were gradually modified in their effects and ultimately replaced by rules more suitable to modern conditions. Owing, indeed, to the early adoption and somewhat indiscriminating application of the Roman law of *occupatio*, it was a fundamental rule of the earlier *jus belli* that all objects taken in war became the property of the captor as soon as he had acquired a firm possession of them; this being a rule which applied equally to persons, property, and territory. As regards persons—who under the Roman law had been the chief object of the *jus postliminii*—the need for having recourse to that doctrine was early dispensed with by the substitution of the practice of detention or ransom for slavery; whilst the recovery of personal freedom that now ensues on escape [illegible]

(*i*) Hall, 563.

(*k*) This was probably the true ground of confiscation, despite the reference made in the judgment to active enmity as a justification: see vol. i. 50, 78.

(*l*) *Supra*, p. 248.

(*m*) Institutes of Justinian, i. 12. 5; Phill. iii. 615.

(*n*) Hall, 482; p. 255, *supra*.

neutral territory (*o*) is more correctly based on the rights of neutral sovereignty. But even as regards property and territory the consequences of the earlier rule of capture proved highly inconvenient, as vesting absolutely in the captor a title to things that still remained subject to the chances of war. In such cases the effect of the doctrine of *postliminium* was, shortly, to convert the captor's title from an absolute into a provisional one, and thus to impose certain necessary restrictions on the captor's action.

(i.) *Its Operation on Property.* (1) As regards moveable property taken on land, although some writers treat this as exempt from the *jus postliminii* by reason of the difficulty of identification, it appears to have been commonly held that such property, if it could be identified, reverted to its former owner if recaptured speedily, or, as was usually laid down, within twenty-four hours (*p*). Under the present system, however, such property is, as we have seen, exempt from seizure, unless it has a military character or is required for military needs or is the property of the enemy State (*q*). (2) As regards property taken at sea, this, although formerly subject to *jus postliminii* in the event of recapture, is now governed for the most part by the municipal law of salvage, which has no present connection with that doctrine (*r*). (3) As regards immoveable property, this, whether belonging to the State or to private persons, was, if seized by a belligerent in occupation, formerly subject to the *jus postliminii*, and reverted to its original ownership on his expulsion or withdrawal before his title had been perfected by conquest (*s*). So, on the termination of the Franco-German war in 1871—when certain persons, who had entered into contracts with the German Government for felling a stipulated quantity of timber in the State forests of certain districts in France then in German occupation, and who had paid for this right in advance, claimed that, inasmuch as the German Government was within its right in letting these contracts (*t*), they ought to be allowed to complete them notwithstanding the termination of the German occupation—the claim was rejected by the French Government on the ground that when the German occupation came to an end, the rights of the former owner reverted, with the result that all rights derived from or through the occupant were put an end to. And this view appears to have been accepted even by the German Government as a correct exposition of the law (*u*). The *jus postliminii* may still, perhaps,

(*o*) As to exceptions in case of prisoners detained on belligerent warships, see vol. i. pp. 259, 264.

(*p*) S. Hall, ii. 504; but also Phill. iii. 616.

(*q*) See pp. 110, 210.

(*r*) For although such a salvage claim the rights of the former owner commonly revert, yet this is, on the one hand, subject to the payment of salvage, and, on the other, it would in most systems notwithstanding the acquisition by the captor of a complete title, which under the earlier system would have extinguished the *jus postliminii*.

(*s*) See p. 250.

(*t*) Although this was, perhaps, doubtful, and would not be permissible now under H. R. 55.

(*u*) See Hall, 483 *et seq.*; Oppenheim, ii. 342.

be said to apply where property belonging to individuals is seized or occupied by an enemy; although the need of it is now not very apparent, as the only purposes for which it can be taken are in themselves provisional and temporary. But in the case of immoveable property belonging to the State the *jus postliminii* has now been replaced by positive regulation, under which the rights of the belligerent occupant are expressly limited to those of a usufructuary (*x*).

ii.) *Its Operation on Territory and Sovereignty:* (1) *After Occupation.*—According to the earlier view, the seizure and occupation by one belligerent of territory belonging to the other was deemed to work a complete—or, at a later time, a partial—substitution of sovereignty (*y*). But here, again, the anomaly of attributing sovereignty and title to a possession manifestly contingent on the hazards of war was relieved by the doctrine of *postliminium;* which, by predicating a restitution of the original sovereignty and title in the event of the withdrawal or expulsion of the occupant, made the latter's title merely provisional and defeasible. This view, whilst consistent with the exercise of all necessary authority over occupied territory, yet excluded any attempt at alienation or permanent change of system until the occupation had been converted into conquest (*z*). And this, in its turn, appears to have paved the way for the modern rule under which military occupation is deemed to confer only a possessory or provisional interest; the rights and duties of the occupant meanwhile resting on the broad ground of military necessity (*a*). But, even on this view, the results of a withdrawal of control are still those derived from the doctrine of *postliminium*. So, when the occupation comes to an end, the authority of the legitimate government will be restored; the operation of the territorial law and the jurisdiction of the Courts, in so far as previously suspended, will revive; whilst private rights and relations, in so far as they were previously affected, will be renewed. Acts done by the occupant in excess of his rights, such as changes in the political system or pretended alienations of property not subject to appropriation, will be wholly annulled; but acts done by him within his rights under the *jus belli*, such as the levy of contributions and requisitions and the alienation of property subject to appropriation, will hold good in so far as they have taken effect; whilst acts done in the ordinary course of civil or judicial administration, such as the collection of taxes or the infliction of punishment for civil offences, will be binding on the restored Government, unless revoked in due course of law (*b*).

(2) *After Temporary or partial Conquest.* It may happen, however, that a belligerent who intends a conquest and purports to

x) H. R. 55; p. 110, *supra*.
a) Hall, 458 *et seq.*
z) Bordwell, 11, 55.
a) Hall, 463.
b) As by appeal. On the subject generally, see Hall, 483 *et seq.*; Oppenheim, ii. 339 *et seq.*

establish his sovereignty over the territory appropriated, is, after an interval, displaced by the former Sovereign. Strictly, in such a case the operation of the *jus postliminii* will depend on whether there was or was not, according to the tests previously indicated, a completed conquest (*c*). If there was, then, on the subsequent displacement of the conqueror, the *jus postliminii* will not apply: the rights of the parties, both on conquest and reconquest, being strictly determinable by the rules of succession (*d*). But if there was not a completed conquest, then the *jus postliminii* with its attendant consequences (*e*) would in strictness apply. Nevertheless, even in this case—and especially if there was any apparent basis for the claim of sovereignty put forward by the intermediate government—the preferable view would seem to be that all rights acquired under its dispositions and in good faith ought to be respected; for the reason that in such circumstances private persons are often not competent to judge of the true character of political changes (*f*).

CLAIMS BASED ON WAR.

(i) BY RESIDENT NEUTRALS.

CLAIM BY AMERICAN RESIDENTS FOR LOSSES SUSTAINED DURING THE BOMBARDMENT OF VALPARAISO, 1866.

[1866: Official Opinions of Attorneys-General of the United States, xii., 21: Moore, Digest, vi., 940.]

Case. On the 31st March, 1866, during war between Spain and Chile, the city of Valparaiso was bombarded by the Spanish fleet. In the conflagration that ensued a large amount of property belonging to American citizens who were domiciled there for commercial purposes was destroyed. The owners subsequently sought the aid of their Government for the purpose of obtaining an indemnity for their losses, either from Spain or Chile. The United States Government, however, acting on the opinion of the Attorney-General, declined to intervene.

Opinion. In his opinion, the Attorney-General [illegible] stated, to effect, that no sufficient ground for intervention as against either

(*c*) *Supra*, p. 245.
(*d*) *Supra*, p. 246.
(*e*) *Supra*, p. 253.
(*f*) See Heffter, s. 178; Phill. iii. 829; and, on the subject generally, Hall, 481 *et seq.*; Halleck, ii. 500 *et seq.*, and Phill. iii. 812 *et seq.*

(*a*) Mr. Henry Stanbery.

Government had been made out. With respect to Spain, the bombardment had occurred in the course of a war then proceeding between that country and Chile; and, although it was under the circumstances a measure of extreme severity, it could not be said to be contrary to the laws of war; nor was it unattended with the preliminary warning to non-combatants usual in such cases; nor did it appear that in the carrying out of the bombardment there had been any discrimination against foreigners or their property. With respect to Chile, again, it did not appear that the Chilian authorities had done or omitted any act of which United States citizens domiciled there had a right to complain; or that the measure of protection which those authorities were bound by public law to extend to American citizens and their property had been withheld. No defence against the bombardment had been made for the reason that it must have proved fruitless, as Valparaiso was then unfortified (*b*). Nor had any discrimination been made by the local authorities between their own citizens and foreigners domiciled there; and all alike had shared in the common disaster. The rule of international law was well established that a foreigner who resides in the country of a belligerent can claim no indemnity for loss of property occasioned by legitimate acts of war (*c*).

This opinion, it will be seen, touches both on the question of the liability of the belligerent invader and on that of the territorial Power. With respect to the former, the governing rule is that neutrals resident in an invaded country are, together with their property, subject to the same risks and liabilities as resident nationals; for the reason that by associating themselves permanently with the country, or by failing to quit it on the outbreak of war, they must be deemed to accept all risks which are reasonably incident to that association (*d*). Nor, indeed, has this rule, in its more obvious applications, ever been seriously controverted (*e*). To hold otherwise

(*b*) The bombardment of "undefended" ports and towns by naval forces is now forbidden by the H. C., No. 9 of 1907: see p. 117, *supra*; and, as to the earlier law, Wharton, Dig. ii. 599.

(*c*) Reference is also made to the bombardment of Copenhagen by Great Britain, see vol. i. 164; and to the bombardment of Greytown by the United States, see Wharton, ii. 588 *et seq.*; in both of which, property belonging to resident foreigners was destroyed without any admission of liability on the part of either belligerent, *ibid.* 586.

(*d*) See vol. i. 204.

(*e*) For other instances of its application, see Wharton, Digest, i. 583, 586.

would be to confer on neutrals extra-territorial privileges (*f*). Hence the State to which they belong will have no ground of complaint, unless they are unfairly discriminated against, or unless the acts in question were not warranted by the laws of war. Their position in relation to the territorial Power is described in the case next following.

GILES *v.* THE REPUBLIC OF FRANCE.

[1880; Moore, Int. Arb. iv., 3703.]

Case. In 1870, during the siege of Paris by the Germans, a factory situated at Pantin, between the walls and outer fortifications of the city, and belonging to an American citizen, was destroyed together with its equipment and contents. Subsequently a claim for indemnity on behalf of the owner was made by the United States against the French Government. This claim was, with various others, referred for determination to a Commission appointed under a Convention made in January, 1880. From the evidence given before the Commission it appeared that the property in question had in the first instance been damaged and portions of it taken by French soldiers and marauders. Subsequently to this an order was issued by General Trochu for the evacuation of the *zone militaire* within which the factory was situated; and two days later the factory appears to have been destroyed. On behalf of the French Government it was contended, that, even if the facts were as alleged, the acts complained of were the unauthorized acts of soldiers and marauders; that the order of General Trochu did not direct the destruction of the works, but merely the abandonment of buildings within the zone; and that their subsequent destruction, whether by the French as a military precaution or by the German army in its attack on Paris, did not impose any liability on the French Government. In the result, the claim was disallowed by a majority of the Commission; although the United States Commissioner dissented on the ground that compensation should have been awarded for such

(*f*) As to an attempt made at the Hague Conference of 1907 to secure for them a privileged position, see p. 27, *supra*; Pearce Higgins, 85, 293.

injury, amounting in fact to the wrecking of the factory, as was shown to have been caused by French soldiers.

The rules which govern the relation of resident neutrals to the territorial Power in time of war are merely a branch of those general rules relative to domiciled aliens which have already been described (*a*). As regards injuries sustained by them through war, neither they nor their Government will have any ground of complaint against the territorial Power, unless the injury in question was due to or attended by some unfair discrimination against them as neutrals, or unless that measure of protection which Governments are bound to extend to their subjects, whether citizens or not, was unreasonably withheld (*b*). In the case, indeed, where neutral property has been seized or destroyed by order of the territorial Power or its officers, neutrals, in common with citizens, will commonly have a remedy by municipal law (*c*). But for losses incident to the operations of war, or for acts done which were warranted by the laws and customs of war (*d*) they will have no claim, as of right, for reparation or indemnity (*dd*). Nor will a belligerent Government be responsible to neutrals for the acts of marauders, or even for the unauthorized acts of its own soldiers, in a case where these acts were attributable to the state of war then prevailing (*e*). Claims for war losses, if made, are usually referred for determination to commissioners appointed by the respective Governments. So, by a Convention of 1871 made between Great Britain and the United States, a Commission was appointed for the purpose of dealing with claims for war losses sustained by subjects or citizens of the respective parties during the civil war (*f*); whilst by a Convention of 1880 a similar Commission was constituted for dealing with claims by citizens of France and the United States (*g*).

(*a*) See vol. i. 204.

(*b*) *Supra*, p. 257.

(*c*) See, by way of example, Moore, Int. Arb. iv. 3685.

(*d*) Or, even by the territorial law in cases where no indemnity is provided for, subject to the conditions suggested in vol. i. p. 205.

(*dd*) As to compensation *ex gratia*, see pp. 264, 266.

(*e*) See Moore, Int. Arb. iv. 3671 *et seq.*

(*f*) Although this Convention covered also belligerent claims arising out of previous wars.

(*g*) These and other cases are collected in Moore, Int. Arb. iv. c. 65. Some of the cases adjudicated on are noticed elsewhere, see pp. 229, 258, *supra*. In *Martin's Case* (Moore, 3679), an award of damages was made for the destruction of a British vessel in the course of war, but by mistake. In *McDonald's Case* (*ibid.* 3683) a similar award was made for the destruction of British property by the United States forces, within the lines of Federal occupancy. Of the cases decided by the French-American Commission, *Gibbs' Case* and *Myers's Case* (Moore, 3689) are both noteworthy in the present connection.

(ii) AS REGARDS THE PROPERTY OF NON-RESIDENT NEUTRALS—THE RIGHT OF ANGARY.

THE SINKING OF BRITISH VESSELS BY THE GERMANS AT DUCLAIR, 1870.

[Parl. Papers, 1871, vol. lxxi.; Annual Register, 1870, 110.]

Facts.] During the Franco-Prussian war, the German General commanding at Rouen was desirous of blocking the passage of the Seine, in order to prevent the French gunboats from ascending the river and interfering with the German operations. With this object he proposed to sink some six British vessels then lying in the Seine, near Duclair. In the first instance he attempted to come to an agreement with the masters, under which the latter were, after unloading their cargoes, to sink their vessels on receiving payment of their value. This offer was, however, refused; whereupon the German commander, affecting to treat this as a violation of neutrality, ordered the vessels to be sunk by firing on them, this having been done in some cases before the vessels had been finally abandoned by their crews.

The German Justification.] In the explanations subsequently furnished to the British Government, this proceeding was justified by Count Bismarck on the ground that the measure, however exceptional in its nature, did not overstep the bounds of international usage in war. . . . A pressing danger was at hand, and every other means of averting it was wanting. The case was therefore one of necessity, which, even in time of peace, would render the employment or destruction of foreign property admissible, on condition of indemnity. This right—known as the *jus angariæ*—was well recognized in practice, and was in this character admitted by English writers (*a*). In its reply the British Government virtually admitted the correctness of this contention; and—without taking exception, as it might fairly have done, to the methods employed—merely required the payment of a proper indemnity. This was ultimately paid, and included the

(*a*) Reference is made to Phillimore, iii. 51.

value of the ships, and 25 per cent. in addition, the seizure being treated in the light of a forced sale; the highest value of the cargoes at the time of capture, less port dues and charges for unloading which had not then been paid; certain costs that had been incurred for protests and counter certificates; and interest on the sums so ascertained at the rate of 5 per cent. till payment. The cost of transmitting the crews to their homes was also paid. But the British Government refused to put forward a claim on behalf of the masters and seamen for loss of employment and effects.

Property belonging to neutrals, which is only temporarily or accidentally within a belligerent State, is not associated with it to the same extent as that of resident neutrals, and is not, in general, subject to the ordinary incidents of war (*b*). Nevertheless—under a recognized custom of war, commonly referred to as the *jus angariæ* (*bb*)—even such property may be used or destroyed by a belligerent, provided it can be shown that such a proceeding was required by the necessities of war, and subject to the payment of a proper indemnity. In the same war the Germans, under the same plea of justification, seized and used a large quantity of rolling stock belonging to Swiss and Austrian railways (*c*). The seizure of railway material belonging to neutrals is, however, now regulated by Convention (*d*). The right in question also extends to the detention of neutral ships found within the belligerent jurisdiction where this is required for military reasons. So, during the American civil war, the *Labuan*, a British merchant vessel, was detained by the United States authorities in order to prevent the divulgence of important information with respect to a military expedition then about to be dispatched; an indemnity for the detention having subsequently been paid (*e*).

(*b*) Except the risks arising out of the actual conduct of hostilities.
(*bb*) But see *infra*, p. 268.
(*c*) Hall, 742.
(*d*) *Infra*, p. 269.
(*e*) See Moore, Int. Arb. iv. 3791.

(iii) THE QUESTION OF THE USE AND DESTRUCTION OF TELEGRAPH CABLES.

THE CLAIM OF THE BRITISH EASTERN EXTENSION TELEGRAPH COMPANY AGAINST THE UNITED STATES GOVERNMENT FOR DAMAGES AND LOSSES ARISING OUT OF THE CUTTING OF ITS CABLE AT MANILLA IN 1899.

[1900: The Official Opinions of the Attorneys-General of the United States, xxii., pp. 315, 654.]

Case. In 1899, during war between the United States and Spain, and in the course of the naval operations in the Philippines, a submarine cable belonging to the claimant company, which connected Hong Kong with the Philippine islands, was cut by the officer in command of the United States forces within the territorial waters of the enemy. A claim for indemnity was subsequently preferred against the United States Government; but in the result this was refused, in accordance with the opinion given below.

Opinion. The opinion of the United States Attorney-General (*a*) was, in effect, as follows: After referring to an opinion previously given by English counsel favourable to the validity of a demand for indemnity to the extent of the amount expended on the repair of the cable, the Attorney-General observed that, in the light of such opinion, he understood that the claim was limited to the amount there referred to: that it was not denied that the cable was cut as a necessary measure of war: and that it was not pretended that the interruption of traffic in the circumstances existing at Manilla gave rise to any claim for indemnity. The governing rule appeared to be that the property of neutrals permanently situated within the territory of the enemy was, from its situation alone, liable to damage from the lawful operations of war, which this cutting was conceded to have been, and that no compensation was due therefor. It was

(*a*) Mr. John W. Griggs.

said, however, that this rule had never been applied to cables: that the whole utility of a cable over many miles was as much destroyed by cutting it in territorial waters as by cutting it on the high seas, which last, it was said, would undoubtedly entitle the owners to compensation; and, further, that the object of the United States Admiral was not merely to prevent the use of the cable by the enemy but also to use it himself. But in fact the rule above referred to took no account of the character of the property, but only of its location; and no account of any motives either of the owner or of the military authorities whose action was in question. Nor was the application of this rule affected by the supposed extension of the injury beyond territorial waters, for the injury was in fact local and repairable: although, even if it were otherwise, it did not appear that this would alter the rights of the belligerents (*b*). To say that the American Admiral desired to use the cable himself was merely to attribute to him a motive in addition to one which justified his act—which would not in any way diminish his right to cut it. Nor, seeing that he did not use it, could it give rise to any different rule as to compensation. Upon the law of this case, therefore, there appeared to be no ground for the claim to indemnity (*c*).

Appended Note.—Both this and similar claims were rejected on the ground that the cutting of a cable within the territorial waters of an enemy was a lawful act of war, and that a neutral by placing his property in that situation must be deemed to take the risks of war and of all lawful acts incidental thereto (*d*). Nor was the application of this rule held to be affected by any supposed or real extension of the injury beyond the limit of territorial waters. The general rules governing the use and destruction of both land and submarine telegraphs will be considered in a subsequent section (*e*).

(*b*) Such, at any rate, appears to be the effect of the latter part of the opinion at p. 317.

A claim for compensation was subsequently submitted to Congress, but at the end of 1911 no determination had been reached; although the matter may conceivably be dealt with in the agreement between Great Britain and the United States for the settlement of various pecuniary claims outstanding between the two Governments.

(*c*) *Supra*, p. 257.

(*d*) *Infra*, p. 269.

iv) COMPENSATION TO NEUTRALS *EX GRATIÂ*.

THE PROCEEDINGS OF THE SOUTH AFRICAN DEPORTATION COMMISSION.

[1901: British and Foreign State Papers, vol. xciv., 645: The *Times* Newspaper, 10th May, 1901, *et seq.*]

Circumstances leading to Appointment. In 1900, during the South African war, the British military authorities were greatly embarrassed by the presence in the territory then under occupation of a number of aliens of doubtful character, whose loss of employment and antagonism to the British proved a source of much disorder and no little danger. After the discovery at Johannesburg of a plot having for its object the murder of British officers, a considerable number of persons of foreign nationality, whose Consuls could not vouch for their conduct and respectability, were summarily arrested both at Johannesburg and other places, and thereafter deported. These persons were sent back on British transports: whilst on their arrival in the United Kingdom they were met by agents of the British Government, who provided them with the means of reaching their own countries, and at the same time informed them that all claims made in respect of their treatment must be made through their respective Governments. In the result, claims, amounting in the aggregate to about £1,250,000, were preferred by various Powers on behalf of their respective subjects.

The Appointment and Proceedings of the Commission. In April, 1901, the British Government appointed a Commission to inquire into and report on claims for compensation made by friendly Powers on behalf of their subjects by reason of their treatment by the British military authorities in South Africa. The Commission met on the 1st May, 1901, and continued its inquiry [a] until late in the same year: but owing to the fact of an amicable arrangement having been meanwhile reached, it did not issue any final report. Nevertheless, in the course of its pro-

[a] Subject, however, to one lengthy adjournment.

ceedings, which were attended by representatives both of the British and other Governments, the Commission gave certain rulings and adopted certain conclusions on questions of principle, which appear to have served largely as the basis of the settlement subsequently arrived at. Of these the more important are the following: (1) At the outset it was assumed as a guiding principle, that a general commanding an army in the field has an absolute right during the continuance of hostilities to remove or expel from any place within the theatre of the war all persons whose continued presence is considered by him to be dangerous, prejudicial, or inconvenient; this being regarded only as a particular application under circumstances of special emergency of the right possessed by every State to expel aliens whose presence may be considered inimical to its safety (*b*). For this reason the Commission also assumed that its proper function in the enquiry committed to it, was merely to ascertain whether this power of expulsion had in any case been attended by the infliction of unnecessary hardship (*c*). (2) It was consequently ruled that, for the purposes of the enquiry, no one was to be regarded as having a "legal" claim. At the same time the Commission stated that it was prepared to deal with any case in which it was proved that the claimant had been deported without reasonable cause, as being on the footing of a legal claim; and, further, that even the reasonableness of the deportation would not necessarily debar a claimant from compensation where it was shown that he had suffered unnecessary hardship (*d*). (3) The scope of the enquiry was held to be confined to direct damages, all claims for indirect or consequential damages being rejected (*e*). (4) All claims on the part of foreigners who had been admitted as burghers of the Republics were disallowed, notwithstanding the contention put forward by Germany that a man might become a burgher and yet retain his German national character (*f*). (5) The claims of neutrals who had engaged in hostilities against the British, whether personally, or as incident to their employment, were also disallowed (*g*).

(*b*) See vol. i. 203.
(*c*) The *Times*, 10th, 14th May.
(*d*) *Ibid.*, 15th May.
(*e*) *Ibid.*, 13th August.
(*f*) *Ibid.*, 15th May; 24th July; 30th July.
(*g*) *Ibid.*, 31st July; 27th August.

Settlement.] On this basis the Commission proceeded to investigate and adjudicate on a large number of claims, until, in October, any further exercise of its functions was rendered unnecessary by the settlement previously referred to (*h*). By this a lump sum was agreed to be paid to each of the Powers concerned in respect of the claims of its nationals, and was accepted by them in full discharge thereof (*i*); the distribution as between individual claimants being left to the discretion of the Power to which they belonged. The total number of claimants was 1,631; whilst the amount paid under the settlement was £106,950 (*j*).

In general there is, as we have seen, no legal liability incumbent on a belligerent to compensate neutrals residing in enemy territory for injury or damage arising out of military operations or other acts warranted by the laws of war. Hence the action of Great Britain in this case constitutes a precedent of some importance; for, although the award of compensation was expressed to be "of grace," yet it was accompanied by an admission that loss or injury might be a just subject for compensation if the action that gave rise to it, even though warrantable in law, proved to have been unreasonable as regards any particular individual affected or to have been attended by special hardship (*k*). The rulings of the Commission were accepted by the representatives of the British Government, and do not appear to have been challenged, except on certain minor points (*l*), by the representatives of other Powers.

General Notes. *The Position of Neutrals in relation to a Belligerent Invader.* At the Hague Conference of 1907 it was proposed by Germany (*m*) that neutral aliens resident in belligerent territory, and not taking part in the war, should be exempt from requisitions for services bearing directly on the war (*n*); and that neutral property should also be exempt from contributions, and its seizure or destruction prohibited except in case of necessity and on condition of indemnity. But this proposal to confer special privileges on neutrals in enemy territory was resisted by Great

(*h*) See p. 264, *supra*.

(*i*) Except as to a few that were specially reserved.

(*j*) The *Times*, 15th November.

(*k*) *Ibid.*, 29th October.

(*l*) As on the question of the claims of naturalized persons, by Germany; and of those who had engaged in hostilities, especially the employees of the Netherlands and South African Railway, by various Powers.

(*m*) With the support of Switzerland and the United States.

(*n*) Except sanitary services imperatively required.

Britain and other Powers (*o*), and was ultimately abandoned (*p*). Hence, for the present at any rate, neutrals so situated share the liabilities of nationals both in respect of person and property. This being so, a belligerent invader is not responsible for injury or loss accruing to neutrals from acts done by him in the course of his warlike operations, unless such acts were not in fact warranted by the laws and customs of war, or unless in the exercise of them he unjustly discriminated against the neutral (*q*). Nor is a belligerent responsible for the unauthorized acts of private soldiers or mere marauders (*r*). Nevertheless, in practice, claims by or on behalf of neutrals for injury or damage alleged to have been sustained in the course of warlike operations are not infrequently made; such claims being usually referred for enquiry or determination to Commissions, which have in some cases, although rarely, made awards in favour of the claimants (*s*). In the South African war Great Britain, as we have seen, went further, and paid compensation to neutrals in respect of acts which were strictly warranted by the laws of war, provided it could be shown that the action taken was unreasonable or attended by special hardship to the individual. But it still remains to be seen how far this precedent will be followed by other Powers in a like situation.

The Position of Neutrals in relation to the Territorial Power.—Claims by or on behalf of neutrals against the territorial Power may relate to loss or injury sustained either (1) through that Power's own belligerent action, or (2) through the belligerent action of an invading or insurrectionary force. In the first case, the international responsibility of the territorial Power will be governed by the same rules as those of a belligerent invader (*t*). Beyond this, of course, a civil liability may attach under the territorial law as regards property which, whether belonging to subjects or neutrals, has been taken or deliberately destroyed by the military authorities for the purposes of the war (*u*). Strictly, claims of the latter kind ought to be pursued before the civil Courts; but in practice these, too, are often referred although generally only in conjunction with other claims—for enquiry or determination to Commissioners appointed by the respective Governments (*x*). In the second case, the territorial

(*o*) Such as France, Russia, and Japan.

(*p*) With the exception of certain Articles, which merely define the liabilities of neutrals in other respects; see *supra*, p. 284, and, generally, Pearce Higgins, 85, 293, and *supra*, pp. 27, 30.

(*q*) *Supra*, p. 257.

(*r*) *Supra*, p. 259.

(*s*) See Moore, Int. Arb. iv. c. 65; Wharton, Dig. ii. §§ 225, 228. In the claims arising out of the American civil war compensation was only awarded in three cases for the destruction of property within the territory of the insurrectionary States: see Moore, Int. Arb. iv. 3685.

(*t*) *Supra*; and, as to a claim by neutrals to participate in compensation for war losses granted by the territorial Power to its own subjects, see a case arising out of the Belgian Revolution, 1830, referred to by Baty, Int. Law, 97.

(*u*) See, under the law of the United States, *Mitchell* v. *Harmony* (13 How. 115).

(*x*) See the case of *Pelegrin's Heirs* v. *Mexico* (Moore, Int. Arb. iv. 3718),

Power will not in general be responsible, either by municipal or international law, for injury or loss directly caused by an invader, or even for injury or loss arising from disorders caused by the invasion, unless it can be shown either that it failed to adopt such reasonable measures of protection as it was bound by public law to extend to citizens and residents; or that in the adoption of such measures it unfairly discriminated against neutrals (*y*). Nor will the territorial Power be responsible for loss or injury sustained by the action of insurgents against its authority, if the insurgents were recognized as belligerent, or if, in default of this, the insurrection assumed such dimensions as to have passed beyond the control of civil authorities and to require belligerent measures for its suppression (*z*); although there are instances in which compensation, even in such cases, has been made as of grace (*a*).

The Property of Non-Resident Neutrals: the Right of Angary.—A belligerent has also a right to use or destroy neutral property which is only temporarily or accidentally within his territory or control, subject in this case, however, to proof of military necessity, and to the payment of a proper indemnity. This right on the part of a belligerent is sometimes described as a right of angary (*b*). This was originally a royal prerogative (*c*), under which European sovereigns claimed a right of impressing vessels, whether domestic or foreign, found within their waters (*d*), for the purposes of transport in time of war. That such a claim was far from being unusual may be gathered from the fact that its exercise was frequently guarded against by treaty, and that such treaties continue down to the 18th century. It is still recognized by some writers; although in this form it is practically obsolete and scarcely likely to be revived (*e*). The right of a belligerent to use or destroy neutral property temporarily within his power—although sometimes known by the same name really rests not on any royal or official prerogative but on military necessity; and may take effect on any kind of property so long as it is within belligerent territory and under the belligerent's control. Its application to neutral vessels and the usual terms of indemnity have already been described (*f*). Its application to railway material is now regulated

which was referred to a Commission appointed under a Convention made in 1868 between the United States and Mexico. A number of cases of this kind were also decided by the British and American Claims Commission, referred to p. 258, *supra*.

(*x*) *Supra*, p. 257.

(*y*) See Moore, Int. Arb. i. 684; Wharton, Dig. ii. § 223; and, as to the general principles governing the liability of the territorial Power in the case of injuries inflicted on foreigners, *ante*, i. 204.

(*z*) So the French Government gave compensation to the victims of the Communist insurrection in 1871, although under no obligation to do so.

(*a*) Or *droit d'angarie*.

(*b*) Itself derived from the *jus angariæ* of Roman law, under which provincial Governors exercised a right of impressing means of transport.

(*c*) Or, according to some, even on the high seas, although this was probably always irregular.

(*d*) See Taylor, 702; Hall, 741, n.

(*e*) See p. 260, *supra*; and on the subject of angary in general, Hall, 741; Westlake, ii. 117; Oppenheim, ii. 447.

by the Hague Convention, No. 5 of 1907, which provides (1) that railway material belonging to neutral States or individuals shall not be seized by a belligerent except in the case of and to the extent required by absolute necessity, and shall in such case be sent back as soon as possible; (2) that a neutral Power shall have a corresponding right to retain and use railway material coming from the territory of that belligerent; and (3) that compensation shall be paid on either side in proportion to the material taken and the duration of its use (*g*).

The case of Land and Submarine Telegraphs.—(1) With respect to land telegraphs each belligerent is entitled, within his own territory, to exercise such control over these, even though owned by neutrals, as may be warranted by the local law, or by the necessities of war (*h*). So, in time of war, it is usual for each of the belligerent Governments to assume control over all lines communicating directly with the enemy territory, and to exercise a censorship over all messages (*i*) except such as pass between neutral States and their representatives. This course was followed by the United States in the Spanish-American war of 1898; and also by Great Britain in the South African war of 1899, although with some relaxations towards the end of the war. Nor will any claim to compensation arise in respect of such interference, unless this is given by the municipal law. A belligerent in occupation of enemy territory is also entitled to take possession of all telegraphs and telephones; although if owned by private persons, whether neutrals or nationals, they must be restored, and compensation arranged for on the conclusion of peace (*k*). (2) With respect to submarine cables, the land connections of these are, in time of war, subject to the same rights of user and control, whether on the part of the territorial Power or a belligerent invader, as land telegraphs. As regards those parts that lie outside territorial waters, the protection of submarine cables is in general provided for by the Submarine Telegraph Convention of 1884 (*l*); but this Convention expressly declares that its stipulations "shall not in any way affect the liberty of action of belligerents" (*m*). The Hague Regulations also prohibit a belligerent from seizing or destroying cables connecting occupied territory with neutral territory, except in the case of absolute necessity and then subject to an obligation of restoration and indemnity (*n*). Beyond this there are no settled rules. The Institute of International Law, indeed, in 1902, adopted a series of

(*g*) See Art. 19.

(*h*) As between the members of the Telegraph Union (see vol. i. 13), certain powers of user and suspension are expressly recognized by the St. Petersburg Convention, 1875; and these appear to apply in war as well as in peace (see Art. 8), and to extend to all forms of telegraphic communication within the local jurisdiction.

(*i*) Cypher messages being generally forbidden.

(*k*) See H. R. 53.

(*l*) This is given effect to in English law by the Submarine Telegraph Act of 1885, as modified by 50 Viet. c. 3.

(*m*) See Art. 15.

(*n*) H. R. 54.

resolutions on the subject (*o*), which appear to command a general approval, except perhaps in one particular (*p*). In the light of these and the somewhat limited practice of recent times, the following conclusions appear to be warrantable:—(1) When a cable unites neutral territories it cannot be cut or otherwise interfered with. This is universally acknowledged, and has so far been respected in practice. (2) Where a cable unites two parts of the territory of one belligerent, the other belligerent may cut it, either on the high sea or in any other place except neutral waters. So, in the Spanish-American war of 1898 the American commanders cut various cables connecting different parts of Cuba (*q*). (3) Where a cable unites the territories of the two belligerents, each is entitled to cut it anywhere except in neutral waters. So, during the Russo-Turkish war of 1877, the cable connecting Constantinople with Odessa was cut by the Turks. But in the Spanish-American war, cable communication between Havana and Key West was allowed to continue subject to military censorship at either end. (4) When the cable unites the territory of one belligerent with that of a neutral State, the other belligerent may cut it only in the territorial waters of the former; although, according to the rules proposed by the Institute, it may also be cut on the high sea, provided the place at which it is cut lies within the limits of an established blockade (*r*). In the Spanish-American war the American commanders cut, in the enemy waters, all the cables uniting the enemy and neutral countries which they were unable to control; including that between Hongkong and Manilla, and that between Cuba and Jamaica, nearly all of these being the property of neutrals; and this, as we have seen, without any admission of liability (*s*). The question of belligerent rights in this connection is so important that it will probably come under consideration at the next Hague Conference.

NATIONAL INDEMNITY FOR WAR LOSSES.

THE WAR LOSSES COMPENSATION COMMISSIONS OF THE CAPE COLONY.

1900–1904: Cape of Good Hope, Votes and Proceedings of Parliament, 1904, App. L., iv.; 1905, App. L., i.; 1906, App. L., ii.; 1907, Annex., ii.

The Appointment of the Commissioners. In July, 1900, a Commission was appointed by the Government of Cape Colony

(*o*) See *L. de Clercq, Recueil de traités*, xix. 331; Holland, Laws of War, 58; Ortolan, ii. 271.

(*p*) Text relating to the cutting of cables connecting neutral and belligerent territory on the high seas within the limits of an established blockade; as to which see n. (*r*).

(*q*) See Moore, Digest, § 1176.

(*r*) But on this question there still is much divergence of opinion: see Westlake, ii. 281; L. Q. R. xv. 145.

(*s*) See p. 263, *supra*; and, on the subject generally, Westlake, ii. 280; Phillipson, Studies in International Law, 56 *et seq.*

to make enquiry and report on the damage and losses alleged to have been sustained by the inhabitants of certain districts in the Colony in consequence of the events of the war. Various instructions were issued from time to time, both with respect to the scope of the enquiry and the methods to be followed (*a*). The scope of the enquiry, as ultimately ascertained, was limited to direct losses or damage sustained by the action of the enemy or rebels, or by the military operations of H.M. forces within the colony, or by the administration of martial law there, or by the lawless action of the natives. The work of the first Commission was subsequently carried on and completed by another Commission, appointed under the War Losses Compensation Enquiry Act, 1904. The funds necessary for defraying the awards of compensation made by these Commissions were provided in part by loans raised under the authority of statute (*b*), and in part by a subvention granted by the Imperial Government (*c*).

The Awards made. In all some 17,000 cases, involving claims to the amount of nearly £6,500,000, were dealt with, of which claims to the extent of £2,400,000 were allowed by Commissioners. Although the proceedings of these Commissions do not disclose any rulings that touch on matters of principle, yet the fact of such compensation having been granted constitutes a precedent which, if taken in conjunction with other proceedings of a like nature, may be said to possess a certain international significance (*d*). It is also noteworthy (1) that under the awards only direct losses were made the subject of compensation; but (2) that, subject to this, all claims by persons who were *bonâ fide* residents of the colony were considered (*e*). Amongst other things, the Commission found it necessary to direct attention to the gross exaggeration of losses, as a factor that had to be guarded against in such enquiries (*f*). This it endeavoured to check in some

(*a*) That is, as to methods of valuation in the case of buildings, fences, growing crops, stock-in-trade, implements and furniture.

(*b*) The War Losses Compensation Loan Acts of 1900 and 1902.

(*c*) This contribution amounted to £500,000.

(*d*) *Infra*, pp. 272, 273 *et seq.*

(*e*) See Report, 31st January, 1905, s. 10 (1905, App. I. i. 2).

(*f*) See Report, 18th March, 1904, s. 19 (1904, App. I. iv. 17): "every class and race seem with one accord to have determined to make a huge profit out of compensation."

measure by recommending criminal proceedings in cases where *mala fides* was clearly proved (*g*).

These proceedings, although they touch strictly only on a question of national policy, are noteworthy for the reason that they point, when considered in the light of other examples, to the incipient growth of a new usage—attributable to the stupendous waste and destruction caused by modern war and the consequent need for distributing its losses over the whole population (*h*)—which, if it should develop, will not only revive, although in a new form, the earlier principle of solidarity, but should also add largely to the existing deterrents as regards war between States.

General Notes.—*National Compensation for War Losses.*—The direct losses which a war of any magnitude waged under modern conditions entails upon individuals are very great, whilst the indirect losses are likely to be even more considerable. The former are attributable in part to the destruction caused by the actual operations of war, which, as we have seen, extend to private as well as public property (*j*) and for which no compensation is provided: and in part to the levy of contributions, requisitions and the billeting of troops, which are only the subject of a partial and provisional indemnity (*k*). So, it has been estimated that the direct losses entailed on the French in 1870, in a war which lasted only six months, apart from the indemnity of 5,000 million of francs, amounted to some 1,500 millions of francs, of which probably more than half fell on individuals. It is to meet losses such as these, and for the purpose of ensuring their distribution over the population at large and affording relief to individual sufferers, that a policy of national indemnity has been advocated (*l*). The question of the adoption of such a policy is primarily, of course, a national question. At the same time it is a question often touched on by writers on international law (*m*): whilst it has also a certain international bearing, in so

(*g*) See Report, 6th May, 1907, s. 13 (1907, Ann. H. ii. 5).

(*h*) *Infra*. As to a proposed national indemnity for maritime captures, see p. 138, n. (*a*), *supra*: and Barclay, Problems, 200.

(*j*) Such as buildings and their equipment, stores, crops, live stock, implements, stock in trade, machinery, and railways and their material.

(*k*) Even under the H. R. 51, 52, the receipts which a belligerent is required to give for contributions carry no obligation of indemnity: whilst, as regards requisitions, the obligation of ultimate payment even for supplies in kind is, as we have seen, vague and indeterminate: *supra*, p. 112.

(*l*) Although if the experience of the South African Commission is to be relied on, only a proportion of the sufferers are likely to obtain an adequate indemnity, even though some claims may be wantonly exaggerated: see V. & P. of Parl., Cape of Good Hope, 1906, App. I. ii.

(*m*) As by Grotius and Vattel.

far as if generally adopted it might influence in some measure the conduct of war and perhaps add to the existing deterrents (*m*). The policy of indemnifying citizens for losses sustained by invasion appears to have been first adopted by the French during the Revolutionary wars; although owing to lack of funds it was very imperfectly carried into effect. In 1815 a similar policy was adopted by the Government of the restored monarchy; some 140 millions of francs having been appropriated to the relief of private losses sustained during the preceding war. In 1871, again, the French National Assembly voted 100 millions of francs, and somewhat later another 120 millions, by way of compensation for war losses; extending the benefits of these grants not merely to citizens but also to friendly aliens resident in France. Germany also gave compensation to her own subjects who had suffered losses on German soil; but the right to share in this was only extended to resident neutrals on condition of a promise of reciprocal treatment. Finally, in 1904, the Cape Government, as we have seen, applied some £2,400,000 in relief of war losses sustained by *bonâ fide* residents in the Colony, whether nationals or neutrals; whilst the Home Government also provided a fund of £2,000,000 in relief of the losses sustained by British subjects, friendly foreigners, and natives, residing within the conquered territories (*o*).

Relief of Inhabitants of Conquered Territory. – The conquest and annexation of territory do not of course involve any legal obligation on the part of the conqueror to answer for losses incurred by its inhabitants by reason of the war; and this is the position commonly taken up (*p*). In view, however, of the fact that the inhabitants in such a case lose all chance of redress at the hands of the Government that has been displaced, and also as a measure of conciliation, such relief has been occasionally afforded. So, in 1872, Germany granted compensation to its new subjects in Alsace and Lorraine, in respect of losses sustained by individuals through bombardments, although it denied this to domiciled aliens (*q*). At the close of the South African war in 1902, Great Britain established no less than three separate funds in relief of the various classes of persons who had suffered war losses in the territory annexed. These included (1) A sum of £3,000,000, as stipulated by Art. 10 of the Terms of Surrender (*r*), for the purpose of compensating ex-burghers of the late Republics who had sustained war losses and whose circumstances justified assistance. (2) A sum of £2,000,000 for the relief both of resident British subjects, and of others who, whether of British extraction or not, had not taken up arms against the British and had suffered consequent losses (*s*). (3) A

(*m*) In so far, that is, as every individual would become, to an even greater extent than now, a participant in its losses.

(*o*) *Infra*.

(*p*) As by Germany in 1864 in relation to Schleswig-Holstein.

(*q*) Bluntschli, § 662.

(*r*) The Convention of Vereeniging, 31st May, 1902.

(*s*) *Supra*.

military compensation fund, which was intended for the relief of a class designated as "protected burghers," including either ex-burghers who had been hostile but who had surrendered on the faith of specific promises that their property should be protected, or ex-burghers who had rendered active assistance to the British (*t*). These funds were administered through the agency of various local Commissions assisted by the resident magistrates, under the supervision of a central Judicial Commission. The British Government, moreover, not only redeemed all receipts for requisitions levied by the British military authorities; but it received as evidence of war losses suffered by the persons to whom they were originally given, all receipts given by the enemy Government or under its authority, as well as certain notes issued by the South African Republic (*u*), subject only to proof of such receipts and notes having been duly issued in return for valuable consideration. In addition to this, loans were made to the inhabitants of the conquered territory, which were free of interest for two years and thereafter repayable by small instalments extending over a period of years with interest at 3 per cent. (*x*). But such action, whether praised for its generosity or blamed for its lavishness, is scarcely likely to constitute a precedent for future imitation.

PART III.—NEUTRALITY.

THE RELATION OF NEUTRALITY.

CONTROVERSY BETWEEN RUSSIA AND JAPAN WITH RESPECT TO THE NEUTRALITY OF KOREA IN 1904.

The Official History of the Russo-Japanese War (1909), pt. i., 1st & 2nd eds.; V. S. Hershey, The International Law of Diplomacy of the Russo-Japanese War; K. Asakawa, The Russo-Japanese Conflict: Its Causes and Issues; S. Takahashi, International Law applied to the Russo-Japanese War.]

Circumstances leading to Controversy. From a very early time the control of Korea had been in dispute between China and

(*t*) But claims of limited companies or large firms, claims against the dispossessed Government for loss of salary, claims for losses whilst on commando, and claims by rebels, were excluded. On the subject generally, see Parl. Papers, S. A. 1903; the *Times* History of the War in S. A., vi. 13; Beak, The Aftermath of War, 238, 280.

(*u*) Ogilvie Law No. 1 of 1900.

(*x*) This was stipulated for in the terms of surrender; but that it was

Japan. By the Treaty of Shimonoseki, 1895, China abandoned her claim to suzerainty and recognized "the full and complete independence and autonomy" of Korea; although, in fact, this merely paved the way for a more effective domination on the part of Japan. Meanwhile, as early as 1885, a new rivalry over Korea had sprung up between Japan and Russia. Notwithstanding some attempts at arrangement in 1896 and 1898 (*a*), this rivalry increased in intensity as time proceeded, with the result that in 1903 a very serious situation had developed, which was still further accentuated by the dispute over Manchuria (*b*). As regards Korea, each party, whilst professing a desire to maintain its integrity, really wished to absorb or control it for strategic and economic purposes (*c*). With a view to arriving at an understanding, in July, 1903, Japan, as we have seen (*d*), opened negotiations with Russia, but these negotiations after continuing for some time were finally abandoned, with the result that on the 6th February, 1904, war broke out between the parties (*e*). It is material to notice that in these negotiations the position of Korea was one of the main subjects of controversy; and also that Russia had, even before the outbreak of war, massed troops on the Korean frontier, and is said even to have passed them into Korean territory (*f*).

On the 8th February, 1904, the Russian cruiser "Korietz," after an encounter with the scouts of Admiral Uriu's squadron, took refuge in the Korean harbour of Chemulpo; where there were also lying two other Russian vessels, the "Variag" and "Sungari," as well as certain neutral warships, belonging respectively to Great Britain, France, Italy, and the United States (*g*). On the 9th February the Japanese Admiral communicated with the commanders of the neutral warships,

not a sop to the enemy may be gathered from the fact that it formed part of a scheme of repatriation and compensation which had been prepared some months before: see Beak, "Aftermath of War," 34.

(*a*) See Hershey, 15 *et seq.*

(*b*) *Ante*, p. 2.

As to Russian designs, see Hershey, 19; whilst those of Japan are sufficiently indicated by the subsequent course of events.

(*c*) *Ante*, p. 2.

(*d*) Hostilities were actually commenced on the 6th February, whilst formal declarations of war were issued on the 10th: *ante*, p. 1.

(*e*) See Official History (1st ed., pt. i. 12; although this statement is not repeated in the 2nd ed.

(*f*) *The Telbar*, *The Pearl*, *The Elbe*, and *The Vicksburg*.

advising them that unless the Russian vessels quitted that port he would find himself obliged to attack them there, and inviting the neutral commanders to place their vessels out of reach of possible hostilities. Thereupon the commanders of the British, French, and Italian vessels sent a written protest to Admiral Uriu, declaring Chemulpo to be a neutral port and as such exempt from hostilities, in view of which it was claimed that any attack on vessels lying there would be a violation of international law. In the result, the "Korietz" and "Variag" put out to sea: but after a short engagement, in which they were worsted, they were compelled once more to seek refuge in Chemulpo harbour, where they were set on fire and sunk by their crews in order to prevent their falling into the hands of the Japanese (*h*): the crews being received on board the British, French, and Italian vessels (*i*). The reception of these crews by neutral warships threatened to open up a new controversy, but in the result no demand for their surrender was made by Japan (*k*); and after being retained for some time under control (*l*), they were, with the acquiescence of the Japanese Government, taken to Shanghai and there released on giving their parole to take no further part in the war, official lists of those rescued by each of the warships being furnished to the Japanese authorities (*m*).

On the 8th February, Japan also began to disembark troops on Korean territory. Her warships also captured various Russian merchant vessels in Korean waters, including the "Mukden," the "Rossia," and the "Argun" (*n*).

On the same date, also, an agreement appears to have been concluded between Japan and Korea—exacted no doubt under pressure—by which Japan, whilst undertaking "to guarantee the independence and integrity of Korea and to protect her against the aggressions of a third Power or internal disturbances," virtu-

(*h*) *The Sungari* appears to have been captured: Takahashi, 761.

(*i*) The captain of *The Vicksburg* professed his willingness to assist with the wounded, but refused to receive the officers and men on board his ship without an order from his Government: see Takahashi, 163; and generally, the Official History (2nd ed., pt. i. 42, 43.

(*k*) Takahashi, 465; but see also Hershey, 76; and Oppenheim, ii. 424.

(*l*) Probably in deference to H. C., No. 2 of 1899, Art. 57; but see now *supra*, p. 123.

(*m*) Takahashi, 465.

(*n*) Takahashi, 794; Cowen, the Russo-Japanese War, 116, 128.

ally assumed the control both of her Government and territory; a change of situation which necessarily led to the withdrawal of the Russian Minister (*o*).

The Controversy. In view of these occurrences, Russia on the 22nd February addressed a circular Note to the Powers, through her representatives abroad, in which she protested against Japan's action in relation to Korea, as constituting a violation of the customary law of nations. More particularly, it was charged—(1) That before the opening of hostilities Japan had landed her troops in Korea, then an independent State which had declared its intention of maintaining a strict neutrality. (2) That three days prior to the declaration of war Japan had made a sudden attack on two Russian warships in the Korean port of Chemulpo; their commanders having been kept in ignorance of the rupture by the action of Japan in stopping Russian messages over the Danish cable and destroying the telegraphic communication of the Korean Government. (3) That Japan had captured certain Russian merchant vessels before the opening of hostilities and whilst lying in neutral waters. (4) That Japan had announced to the Emperor of Korea that that country would henceforth be administered and, if need be, occupied by Japan. (5) And, finally, that Japan had forcibly compelled the Russian Minister accredited to Korea, as an independent State, to quit Korean territory. In view of such an illegal assumption of power by Japan, it was announced that Russia would henceforth regard all orders and declarations issued in the name of the Korean Government as invalid (*p*).

The Japanese reply to these charges was issued on the 2nd March, and was to the following effect:—(1) With respect to the landing of troops in Korea, it was contended that this had taken place only after a state of war existed *de facto*, even though before the formal declaration; that the maintenance of the integrity of Korea was one of the objects of the war; that Russia herself had previously violated the sovereignty of Korea by sending her troops into Korean territory (*q*); and, finally, that the landing of

(*o*) See Asakawa, 367 *et seq.*; Smith & Sibley, 22, n. 2.

(*p*) Takahashi, 9; Asakawa, 355.

(*q*) See p. 275, n. (*s*), *supra*.

Japanese troops had been made with the consent of the Korean Government. (2) With respect to the charges incident to the attack on the Russian warships at Chemulpo, Japan denied that she had stopped any messages or interfered in any way with the telegraphic communication. For the rest, a state of war existed at the time, and, in view of Korea's consent to the landing of troops, Chemulpo had ceased to be a neutral port, at any rate, as between the belligerents. (3) With respect to the seizure of Russian merchant vessels in Korean waters, the legality of such captures was a question to be decided by the Prize Courts of the captors' country (*r*). (4) With respect to the alleged overthrow of the independence of Korea, this charge was declared to be wholly devoid of foundation. (5) With respect to the alleged expulsion of the Russian Minister from Korea, it was stated that that official had withdrawn of his own free will, although an escort of Japanese soldiers had been furnished for his protection (*s*).

Although this controversy, like the larger dispute of which it formed a part (*t*), was not of a character to admit of judicial settlement, it serves nevertheless to illustrate certain essential features of the relation of neutrality, as well as a variety of other points of some international importance (*u*). (1) The main issue was whether the action of Japan in regard to Korea constituted a violation of the recognized rules of international law. As to this it is clear that if Korea did at the time occupy the position of a neutral State, then the action of Japan was at once a violation of Korean neutrality; and a proceeding which, if acquiesced in by Korea, would have afforded Russia a *casus belli* against the latter. But even if this were so, it does not appear that the action of Japan, in forcing the hand of Korea — unless indeed she had previously pledged herself to respect Korean neutrality — would have constituted an offence in international law, or have afforded any cause of complaint to other Powers (*v*); for, so far, it cannot be said that there is either a right, or even a duty on the part of any State to remain neutral (*w*), but only that while neutrality is recognized or professed its incidental

(*r*) To which Russia subsequently replied that seizure before a declaration of war was mere piracy, and not defensible by the establishment of Prize Courts: Asakawa, 362.

(*s*) Takahashi, 12 *et seq.* Notwithstanding this disclaimer, Russia, on the 12th March, reiterated her previous charges: Asakawa, 360.

(*t*) *Supra*, p. 5.

(*u*) Such as the validity of agreements extorted by pressure; the propriety of the intervention of the neutral commanders; and the treatment of belligerent combatants rescued by neutrals.

(*v*) But see p. 279, *infra*.

(*w*) *Infra*, p. 280.

obligations on either side must be duly observed. The question of whether that relation exists or not is at bottom a question of fact. In the case under consideration it seems clear that Korea did not occupy the position of a neutral State in the ordinary sense of the term: for the reason that she was not really independent, and that the control of her territory was one of the main objects of the war (*y*)—a fact which Russia had already recognized by placing her forces on the Korean frontier on a war footing and passing troops into Korean territory (*z*). Moreover, it appears to be clear that whatever may have been the original intentions of the Korean Government, Japan desiring to avoid the rôle of either conqueror or military occupant, and with a view to legalizing her subsequent proceedings had previously forced on Korea, in the guise of a guarantee (*a*), an arrangement under which the former virtually assumed control both of the territory and government of the latter, and had thus identified Korea with herself in all that related to the war. After this all question of the neutrality of Korean territory was necessarily at an end (*b*). The Russian announcement that she did not regard Korea as a belligerent but as a neutral State acting under pressure and deprived of the power of free action, was probably designed to secure her own freedom of action, as regards treaties and concessions, in the event of her ultimate success (*c*). (2) The controversy next suggests a question as to the legality of an agreement such as that of the 8th February, which was no doubt forced on Korea by military and political pressure. Such an agreement, however, is, as we have seen, not invalidated merely by duress (*d*); and, even if we accept the qualification which is sometimes attached, that such agreements in order to be valid must not be in subversion of the entire independence of the State (*e*), the agreement in question does not on its face bear this character, even though in the events that ensued it may have had this result (*f*). (3) With respect to the protest of the neutral commanders at Chemulpo, this appears to have been altogether unwarrantable. It was founded, as we have seen, upon a complete misapprehension as to the actual position of Korea. Moreover, even if Korea had occupied the position of a neutral State, a violation of her territory would not have afforded any cause of complaint to other neutral Powers, unless it either imperilled their special interests or involved a violation of some international compact, or was attended by some act of gross inhumanity. Nor, again, are the merely local agents of a State, in such a case, justified in intervening, unless the lives or property of their nationals are threatened, which was not the case at Chemulpo (*g*); it being other-

(*y*) Which was, as has been said, "a war for Korea, and in Korea, if not with Korea": Lawrence, War and Neutrality, 282.

But see p. 275, *supra*.

(*z*) This was the agreement of the 8th Feb., 1904, *supra*, p. 276.

(*a*) Korea was, in fact, annexed by Japan by a proclamation of the 30th August, 1910.

(*b*) *Supra*, p. 277; Hershey, 73.

(*c*) See vol. i. 349.

(*d*) See Hall, 319.

(*e*) *Supra*, p. 7.

(*f*) Notice of the intended attack and opportunity of withdrawal having

wise their duty merely to refer the matter for determination to their own Government (*h*). (4) With respect to the action of the neutral warships, in receiving on board the crews of the Russian warships after the latter had been destroyed, although the right of rescue was perhaps doubtful at the time, yet both the reception and the after treatment of these crews appear to have been in accordance with the rules now embodied in the Hague Convention, No. 10 of 1907, Art. 13 (*i*).

General Notes.—*The Relation of Neutrality.*—A "neutral State" is one which in a war between other States sides with neither party. In the first instance, international law contemplates as between States only a relation of peace or war. But once war exists between two or more States, then an ancillary relation—that of neutrality—arises between each of the belligerents and other States that take no part in the war. In virtue of this a neutral State is, on the one hand, bound to abstain from all interference in the war and to act impartially towards each of the belligerents; whilst it is, on the other hand, exempted from the direct effects of war (*j*). And this applies also to "neutral individuals"; who, according to one view, are identified with the "nationals" of States that are themselves neutral, whilst, according to another, they are identified, at any rate for most of the purposes of the war, with persons resident and domiciled in such States (*k*). It is not unusual for States that take no part in the war to issue a declaration of neutrality; but, even without this every Power will be presumed to be neutral unless it clearly manifests a contrary intention. There is, however, so far, neither a duty nor even a right on the part of any particular State to remain neutral. On the one hand, any State is at liberty in a war between its neighbours to take part in the struggle if it chooses; on the other, either belligerent is equally at liberty to treat as hostile a State that would otherwise be neutral; the making of war being so far only a question of policy and justice, which each State must decide for itself, subject to the sanction of international opinion. Hence we must exclude from what is afterwards said as to "neutral territory," such territory as is the object of contention or the scene of the actual warfare. But once the relation of neutrality is established and recognized, then the rights and duties incident thereto must be observed (*l*).

Gradations and Kinds of Neutrality.—A distinction was formerly

already been given: *supra*, p. 275; Lawrence, War and Neutrality in the Far East, 75–80.

(*h*) *Ibid.* 75 *et seq.*

Supra, p. 123.

(*j*) So long, that is, as its neutrality stands.

(*k*) See the H. C., No. 5 of 1907, Art. 16, which defines a neutral individual as "a national" of such a State; but Great Britain has signed under reservation of this Article; and, as to the Anglo-American doctrine, p. 27 *et seq.*, *supra*.

(*l*) See Westlake, ii. 161 *et seq.*; Oppenheim, ii. 316 *et seq.*

drawn, and even recognized in practice, between different grades and kinds of neutrality. So, neutrality was treated as being either "strict" or "imperfect"; and if "imperfect," then as being either "impartial," where equal privileges were conceded to both belligerents; or "qualified," as where a neutral State was bound by some antecedent engagement to furnish troops or ships, or to allow a passage over its territory (*m*), to one of the belligerents (*n*). But under the present system, the neutral relation, in so far at least as its obligations are defined (*o*), is insusceptible of any legal qualification. As regards what was called "impartial" neutrality, no privilege inconsistent with strict neutrality can now be granted to one belligerent under guise of being equally available to the other, whilst discretionary privileges must be equally granted to or withheld from both. As regards "qualified" neutrality, no aid or privilege inconsistent with neutrality can now be granted to either belligerent by virtue of any anterior engagement. It is no doubt true that owing to the lack of precision in the rules determining neutral duty, it was formerly possible to observe a neutrality which, although not in flagrant violation of admitted usage, was nevertheless "favourable" to one of the belligerents (*p*); and further that such a favourable neutrality was sometimes stipulated for by treaty. But in principle, and now also by reason of the better definition of neutral duties (*q*), such a position would be altogether indefensible. Hence such terms as "favourable," or "benevolent," or "armed" neutrality now possess no legal significance. At the same time, the relation of neutrality is still quite compatible with an attitude of political sympathy towards one of the parties to the war, so long as the obligations incident to neutrality are duly observed in regard to both parties (*r*). "Permanent" neutrality is, as we have seen, a status attaching to territory, and has no connection with the subject with which we are here concerned (*s*). The relation of neutrality involves certain rights and corresponding duties on the part of both belligerents and neutrals. These it will be convenient to treat under the heads of (1) the rights of neutral States; (2) the duties of neutral States; and (3) the rights and liabilities of neutral trade, which, although strictly included under the duty of acquiescence and its limits (*ss*), really need to be considered apart.

(1.) *The Rights of Neutral States.* The existence of rights specially referable to neutrality is sometimes denied on the ground that such rights equally obtain in time of peace. But even if this be so, the rights in question assume in time of war a character, and are attended by incidents, so distinct, as to claim some independent

(*m*) For an instance of this, see vol. i. 111.

(*n*) See Oppenheim, ii. 327.

(*o*) See p. 282, *infra*.

(*p*) See p. 302, *infra*; and Oppenheim, ii. 356.

(*q*) As by the H. C., No. 13 of 1907; *infra*, p. 284.

(*r*) On the subject generally, see Westlake, ii. 173; Wheaton (Dana), 510, 517; Phill. iii. 226 *et seq.*

(*s*) See vol. i. 53, 150.

(*ss*) *Infra*, p. 283.

consideration (*t*). From this standpoint, then, the rights of a neutral State are briefly these:—(1) Every such State is entitled to have the integrity of its territory and territorial waters respected by each of the belligerents, both as regards the actual conduct of hostilities, the making of captures, and the preparation of acts of war; and also to prevent or nullify, so far as possible, all acts done in violation thereof. The vindication of this right, in a case where it has been violated by one belligerent to the prejudice of the other, is treated also as a duty to the latter (*u*). (2) A neutral State is also entitled to exact compliance by each of the belligerents with such municipal regulations as it may make for the purpose of ensuring the observance of its neutrality and the performance of its international obligations, even though these may involve restrictions that would not be permissible in time of peace (*x*). Such regulations, although framed with reference to a common standard, vary greatly in different States; but in any case their enforcement, if applied equally to both parties, cannot be considered as hostile or unfriendly (*y*). (3) A neutral State is also entitled to maintain and continue its diplomatic intercourse with other States, including the parties to the war (*z*); and to require that the commercial intercourse of its subjects shall not be restricted except at certain points warranted by custom or convention (*a*).

(ii.) *The Duties of Neutral States.*—Amongst the duties of neutral States there is, first, the general duty of impartiality. This was probably the starting-point of the whole of the present scheme of neutral duties; but as a subsisting obligation it must now probably be interpreted as meaning that all powers exerciseable by the neutral in relation to the belligerents, whether obligatory or discretionary (*b*), must be applied without discrimination or preference (*c*). Subject to this controlling principle, the duties of a neutral State may be conveniently grouped as follows (*d*):

(*t*) So, a violation of neutral territory in time of war carries not only a right but a duty to exact reparation; the regulations designed to safeguard a State's neutrality are, moreover, framed with special reference to war and carry powers and remedies not otherwise available; whilst the ordinary rights of States in time of peace are subject to many restrictions on the outbreak of war: see vol. i. 263.

(*u*) *Ante*, pp. 294, 300.

(*x*) See vol. i. 263.

(*y*) See H. C., No. 13 of 1907, Art. 26; *ante*, p. 304.

(*z*) Save for such momentary interruption as may be incident to some particular military operation, or required by temporary military necessity: see vol. i. 308.

(*a*) See p. 384, *infra*; and on the subject generally, Oppenheim, ii. 378 *et seq.*; Lawrence, Principles, 499 *et seq.*; Taylor, 687.

(*b*) As in the case of the admission of prizes to neutral ports.

(*c*) See H. C., No. 5 of 1907, Art. 9.

(*d*) The classification followed is that suggested by Professor Holland, who classes neutral duties as being those of abstention, prevention, and acquiescence: see "Neutral Duties in Maritime War as illustrated by recent events," published in the proceedings of the British Academy, 1905–1906; also Holland, Jurisprudence, 395. As to a proposed revision of the law of neutrality, both in form and substance, see Barclay, Problems, c. xii.

(1) There are certain acts which a neutral State must itself abstain from doing. So, a neutral State must not furnish either belligerent with troops, ships, munitions of war, money, or indeed with anything that may aid him in the war; nor may it now grant passage to his troops over its territory (*e*). And this duty will attach not merely in relation to the public acts of the State itself but also in relation to the acts of its officials and public servants (*f*). (2) Next there are certain acts which a neutral State is bound to prevent (*g*) other persons, whether neutral or belligerent, from doing within its territory or jurisdiction. So, it is bound to prevent the enlistment of men or the issue of commissions on behalf of either belligerent, the conduct of hostilities, the effecting of captures, the use of its territory for the preparation of acts of war or as a base of operations, and the despatch therefrom of vessels fitted for war if intended for the service of either belligerent. The rules and methods adopted for ensuring the due observance of this obligation in each particular system form the subject of the national law of neutrality (*h*). (3) Finally, a neutral State is bound by a duty of acquiescence, as regards certain acts done by either belligerent which involve an interference with neutral persons or neutral property that would not be permissible in time of peace, so long as these are confined within the limits prescribed by custom and convention. Some aspects of this duty have already been touched on; but its most important aspect is that which relates to belligerent interference with neutral commerce on the sea. This particular branch of the law of neutrality, however, although presented under the guise of a duty of acquiescence on the part of the neutral State itself (*i*), really appears to involve a direct relation between the belligerent and neutral individuals (*k*), and thus to constitute in effect a separate subdivision.

(iii.) *The Rights and Liabilities of Neutral Trade.* This branch of neutrality has its origin in the acknowledged right of each belligerent in maritime war to exercise a right of visitation and search over neutral vessels, to detain such of them as may be reasonably suspected of carrying contraband, intending to violate blockade, or engaging in acts of hostile or unneutral service, and to confiscate the property involved on proof of delinquency. This right is commonly based on the view that such acts derogate from the right which each belligerent has to carry on his military operations with-

(*e*) But as to wounded, see p. 314.

(*f*) See, by way of example, the King's Regulations and Admiralty Instructions, Art. 486.

(*g*) So far, at any rate, as due diligence or the vigilant exercise of the means at its disposal will suffice to prevent them: see p. 340-1.

(*h*) See pp. 371, 389, *et seq.*

(*i*) In order, of course, to bring it into conformity with the accepted view that international law is exclusively a law between States.

(*k*) And is in fact so treated in some recent regulations: see, by way of example, H. C., No. 5 of 1907, Arts. 16, 17; and the Declaration of London, Arts. 47, 64.

out obstruction to himself or assistance to his enemy on the part of neutrals. And such was no doubt its original basis and scope; although it now appears to have a wider range, and, in some particulars at any rate, to represent a compromise between the conflicting interests of belligerents and neutrals which has been reached without regard to the original principle (*l*). But however this may be, it is clear that under the present practice the neutral State, saving its duty of acquiescence in lawful restraints and its right of intervention if these limits are exceeded, has, for the rest, neither duty nor obligation in the matter; the responsibility and risk of such acts resting solely with the neutral individual, and their restraint and punishment (*m*) solely with the belligerent State. It is sometimes contended, indeed, that in principle (*n*) an obligation of prohibiting these acts on the part of its subjects and others within its territory ought to be imposed on the neutral State itself (*o*); but as this would increase largely the responsibilities of neutral States, would fetter trade by constant inquisition, and would probably lead to much friction between the neutrals and belligerents, the present practice is probably more convenient (*p*).

Conventions relating to Neutrality.—The law of neutrality, like the law of war, of which it strictly forms a part, is based in part on custom and in part on convention (*q*). With respect to the conventional part, some of the Hague Conventions, although primarily operative as between States at war, yet contain provisions that may incidentally affect neutral interests (*r*); whilst others purport to apply both to belligerents and neutrals (*s*). These have already been referred to (*t*). There are, however, other Conventions which are specially concerned with neutrality. These comprise: (1) The Hague Convention "respecting the Rights and Duties of Neutral Powers and Persons in War on Land," No. 5 of 1907, which treats of the rights and duties of neutral Powers, the internment of belligerent troops, the care of the wounded in neutral territory, the status of neutral persons, and the impressment of railway material in land warfare (*u*). (2) The Hague Convention "respecting the Rights and Duties of Neutral Powers in Maritime War," No. 13 of 1907, which deals with a large number of questions previously unsettled in relation to the rights and duties of neutrals and belligerents in maritime warfare, and which may, indeed, be said to constitute

(*l*) Although the original principle itself was probably the outcome of compromise: *supra*, p. 384; Hall, 627 *et seq.*; Westlake, ii. 161.

(*m*) Although only in the limited sense referred to hereafter, p. 385, *infra*.

(*n*) In order, that is, to make the relation immediately one between State and State.

(*o*) For projected regulations on this subject, see Barclay, Problems, 163.

(*p*) See Hall, 75 *et seq.*; but see also Westlake, ii. 168; and Oppenheim, ii. 363 *et seq.*

(*q*) *Supra*, p. 93.

(*r*) Such are the Conventions Nos. 4, 7, 8, and 9 of 1907.

(*s*) Such are the Conventions Nos. 11 and 12 of 1907.

(*t*) *Supra*, p. 93 *et seq.*

(*u*) This has been signed by forty-two Powers, but by Great Britain under reservation of Arts. 16, 17, and 18. See Table, App. xiv, *infra*.

the beginning of a code of neutrality (*x*). (3) The Declaration of London, 1909, which is directed mainly to a settlement, so far as was found practicable, of the rights and liabilities of neutral trade; including the subjects of blockade, contraband, unneutral service, the destruction of neutral prizes, transfers to the neutral flag, the right of convoy, and compensation for unlawful seizure. This Declaration, although signed by all the States represented at the Naval Conference, has not, indeed, so far been ratified or accepted by Great Britain. At the same time, even if it should remain unratified, it is likely, in view both of the uncertainty of the customary law on these subjects, and of the intrinsic reasonableness of the rules which it embodies—save on certain points referred to hereafter—to set the standard of international action in the future. If, moreover, it should ultimately be adopted by a majority of the leading maritime Powers, it will probably have to be accepted in practice even by Powers that do not ratify it, for the reason that belligerents who act under it in the future will do so under a claim of common approbation which it will be difficult for neutrals to gainsay; whilst, with the growth of naval power on all sides, it is probable that neutrals would combine against a belligerent who sought to enforce rights seriously at variance with it.

THE COMMENCEMENT OF NEUTRALITY.

THE CASE OF THE "KOWSHING."

[Holland: "Studies in International Law," 126.]

Case. In July, 1894, the relations between China and Japan were greatly strained; and in view of the possible outbreak of hostilities, which in fact occurred soon afterwards, China began to despatch troops and military material to Korea, which was at once the cause and likely to be the theatre of the war. Amongst the transports employed for this purpose was the "Kowshing," a British vessel hired by the Chinese Government. On the 25th July, the "Kowshing," whilst thus engaged in carrying troops and material of war, was met in Korean waters by the "Naniwa," a cruiser belonging to the Japanese squadron, then engaged in the pursuit of certain Chinese vessels by which that squadron had been previously attacked. On the appearance of the "Kowshing,"

(*x*) This has been signed by thirty-nine Powers, but not by the United States, and by Great Britain only under reservation of Arts. 19 and 23. See Table, App. xiv. *infra*.

the "Naniwa" signalled the latter to lay to, and a Japanese officer was thereupon sent on board. On the discovery of the nature of the service on which the "Kowshing" was engaged, she was ordered to follow the "Naniwa" to a Japanese port. The captain and officers, who were British, were willing to comply; but the Chinese troops on board refused to allow this, threatening to shoot the officers if any attempt were made to take the vessel to Japan. After some further parleying the "Naniwa" signalled to those on board the "Kowshing" to quit the vessel at once; and soon after opened fire on her and sank her. Most of the Europeans on board were rescued by the "Naniwa," whilst of the Chinese some were rescued by a French gunboat, and others succeeded in reaching the shore of some neighbouring islands. On the 1st August war between China and Japan was formally declared. The sinking of the "Kowshing" provoked much resentment in the United Kingdom; the action of Japan being denounced by some as a violation of international law for which it behoved the British Government to exact both reparation and apology. It was in the course of the discussion that ensued that Professor Holland gave expression to the following opinion, which appears to have influenced, or, at any rate, to have coincided with, the view of the transaction ultimately taken by the British Government.

Opinion.] This opinion was, in effect, as follows:—In the first place, a state of war between China and Japan existed at the time. It being common knowledge that war might legally commence with a hostile act on one side without prior declaration (*y*), it followed that in the present case, whether hostilities had previously occurred on the mainland or not, the acts of the Japanese commander in boarding the "Kowshing" and threatening her with violence in case of disobedience to his orders, were acts of war. In the second place, the "Kowshing" had notice of the existence of a war, at any rate from the moment when she received the orders of the Japanese commander. Hence, before the first torpedo was fired, she was, and knew that she was, a neutral ship engaged in the transport service of a belligerent. Her liabilities, as such

(*y*) This was, of course, before the H. C., No. 3 of 1907.

ship, were twofold: (1) As an isolated vessel, she was liable to be stopped, visited, and taken in for adjudication by a Japanese Prize Court; whilst if, as was the fact, it was impossible to put a Japanese prize crew on board her, then the Japanese commander was within his rights in using any amount of force necessary to compel her to obey his orders. (2) As one of a fleet of transports engaged in carrying reinforcements to the Chinese troops on the mainland she was clearly part of a hostile expedition, or one that might be treated as hostile, which the Japanese were entitled, by the use of all needful force, to prevent from reaching its destination. The force actually employed did not appear to have been in excess of what might lawfully be used, either for the arrest of an enemy's neutral transport, or for barring the progress of a hostile expedition. The rescued officers having also been set at liberty, it did not appear that there had been any violation of neutral rights, in respect of which either apology or compensation could be demanded.

Although the obligations and liabilities incident to neutrality will not ordinarily accrue until notice of the war has been received, yet if the nationals of one State engage in the military or naval service of an intending belligerent they will be liable to be treated as enemies, and their vessels so engaged will be liable to capture and attack by the other belligerent, as from the time when war *de facto* ensues, and this even though the war may commence in some act of force directed against them or their vessels (*a*).

General Notes. *The Question of Notice to Neutrals.*—In view of the general rule already referred to that notice of the war is a necessary condition of neutral liability, it was the practice, even before the Hague Convention, for belligerents, either on or immediately after the outbreak of war, to issue a manifesto, which served at once to affect neutrals with notice and to fix the date as from which their liabilities would commence, notice to the State being in this case notice to its subjects. This practice, it has been said, was as obligatory as an act of courtesy could well be (*b*). But

(*a*) In English law, however, such acts, if done by British subjects, would not constitute an offence under the Foreign Enlistment Act, 1870, s. 4, unless undertaken or continued after actual or constructive notice of the commencement of hostilities: see *U. S. v. Pelly* (W. N. (1899) 11).

(*b*) Hall, 570.

even if no such notice were issued, a neutral State and its subjects were deemed to be bound, if it could be shown that there was knowledge of the war *aliunde*, or if its existence was a matter of common notoriety (*c*). The matter is, however, now governed by the Hague Convention, No. 3 of 1907 (*d*). With respect to neutrals this Convention provides that the existence of a state of war ought to be notified to neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, although this may be given by telegraph; subject, nevertheless, to the proviso that absence of notification shall not avail if it can be proved beyond question that the neutral was aware of the existence of a state of war (*e*). This rule is to apply as between a belligerent and any neutral States that are parties to the Convention (*f*). To this extent the Convention turns what was before a requirement of comity into a legal obligation, although without relaxing the earlier liability in cases of actual knowledge (*g*). Nor would it affect the liability of vessels engaged, like the *Kowshing*, in the service of an intending belligerent. In the case of a civil war, the liabilities of neutrals as such will commence as from the time when a status of belligerency in its international sense (*h*) is established (*i*). Prior to this, and in a case where the struggle is between a recognized State and a community or body in insurrection against it, there is strictly no state of war, and no relation of neutrality with its attendant duties and liabilities; even though other States may be bound —as by a duty incident also to the relation of peace—not to allow aid to be afforded by their subjects to rebels against a friendly Power, and even though this may be enforced under the national neutrality law (*k*).

NEUTRAL TERRITORY.

I. ITS INVIOLABILITY.

THE "TWEE GEBROEDER."

[1800; 3 C. Rob. 162.]

Case. During war between Great Britain and Holland four Dutch ships were captured by the British in the Western Ems

(*c*) See Westlake, ii. 27, 28; and the case of *The Ariadne* there cited.

(*d*) *Supra*, p. 18.

(*e*) Art. 2.

(*f*) Art. 3.

(*g*) *Supra*, p. 287.

(*h*) See vol. i. 66.

(*i*) This, as has been already pointed out, will arise if either the belligerency of a rebel Government is recognized by neutrals, or if the legitimate Government assumes to adopt measures affecting neutrals which are only permissible in international war: see p. 11, *supra*.

(*k*) In English law, *see The Salvador* (L. R. 3 P. C. 218); *U. S. v. Pena* (W. N. 1899, 11); and, on the question generally, Hall, 34, n.; Westlake, ii. 28; Oppenheim, ii. 365.

by boats sent out from H.M. ship "L'Espiègle," which was then lying in the Eastern Ems, off the coast of Prussia. A claim for restitution was made by the Consul for Prussia by direction of his Minister, on the ground that the capture had been made within the limits of Prussian territory. It appeared that the place where the warship was lying was, at the most, three miles from East Friesland, and was, in fact, at low tide immediately connected with the land, and therefore to be considered as part of it. Under these circumstances it was held that inasmuch as "L'Espiègle" was lying within limits in which all hostile operations were by the law of nations forbidden to be exercised, and inasmuch as the capture, although effected by boats outside those limits, must be deemed to have originated with the ship in her then situation, a decree of restitution must be made. At the same time, in view of the fact that the situation was sufficiently dubious to relieve the captors of any intentional violation of neutral rights, costs and damages against them were refused.

Judgment.] Sir W. Scott, in giving judgment, after referring to the situation of the vessel, laid down that no use of neutral territory for the purposes of war was to be permitted. That did not indeed apply to remoter uses, such as the procuring of provisions therefrom, which the law of nations universally tolerated; but no proximate acts of war were in any manner to be allowed to originate there. And that a ship should station herself in such territory and send out her boats on hostile enterprises, was an act of hostility much too immediate to be permitted. For supposing even that a direct hostile use were required in order to bring a case within the prohibition of the law of nations, could it be said that the very act of sending out boats to effect a capture was not in itself a directly hostile act, not indeed complete, but nevertheless clothed with all the characteristics of hostility? If such an act could be defended it might well be said that a ship lying in a neutral station might fire on a vessel lying outside. But no one could deny that such an act would be an hostile act immediately commenced within neutral territory. And between firing cannon shot and sending out armed boats there was no substantial difference. In each case the act of hostility took its

commencement from neutral territory. It was not only direct hostilities that were so forbidden, but anything immediately connected with hostilities. So even prisoners or booty could not be carried into neutral territory there to be detained, because such an act was an immediate continuation of hostility. Every government was justified in interposing in such a case; for if the respect due to neutral territory was violated by one party it would soon provoke similar treatment from the other, with the result that what was neutral ground would soon become the theatre of war.

This case serves to illustrate not merely the general immunity of neutral territory from actual hostilities and the grounds on which it rests, but also that such territory must not be used by either belligerent even as a starting-point for any proximate act of war. Neutral territory, for this purpose, includes the littoral sea to the extent of three miles from the nearest land, as well as all other waters that are regarded as "territorial" by the law of nations (*a*). In 1864, indeed, when the United States warship *Kearsage* lay off Cherbourg with the object of engaging the Confederate cruiser *Alabama* on her quitting that port, the French Government expressed its unwillingness to permit an engagement at such a distance from the coast as would place the shore within reach of the guns of the belligerents; but the United States Government replied that it did not admit any right on the part of France to interfere at a distance exceeding three miles (*b*). And although in view of the increased range of modern guns, it is commonly agreed that this limit needs to be extended, yet this can only be given effect to by international agreement (*c*). In the *Anna* (5 C. Rob. 373), it was held that the limit of the marginal sea for this purpose was to be reckoned from any occupiable soil (*d*), so long as such soil constituted a natural appendage to the land. Nor will the fact of a prize having been chased from the high seas into neutral waters (*e*) justify a capture there; the immunity of neutral territory from hostilities being subject to no exception save for the purposes of self-defence (*f*). But in the *Twee Gebroeders* (3 C. Rob. 336), it was held that the act of a war vessel in merely passing through neutral waters, even though *animo capiendi*, was not a violation of neutral

(*a*) See vol. i. 131, 139, 143; and Phill. iii. 565.

(*b*) Moore, Int. Arb. ii. 1118.

(*c*) See vol. i. p. 140.

(*d*) Even though, as in that case, it took the form of uninhabited islets that had been formed by the silt of the mouth of a river.

(*e*) As to the rule of "hot pursuit," see vol. i. 169.

(*f*) And against attack already begun: cf. vol. i. p. 162; but for a possible extension of this, see *ante*, p. 298. See also *The Twee Gebroeders*, 3 C. Rob. 15; Wheaton, Dana, 522 *et seq.*; Phill. iii. 587.

territory, or in itself liable to affect the validity of any subsequent capture.

Where a capture has been made in violation of neutral territory, the captor's State was bound, even under the customary law, on proof of such violation and on claim by the neutral State, to make restitution either by administrative act or through its Courts. So, in 1864, when the *Florida*, an armed vessel of the Southern Confederacy, was seized by a United States warship in Brazilian waters, the United States Government, on the complaint of Brazil and notwithstanding that it refused to recognize the *Florida* as having belligerent rights, admitted the illegality of the seizure, and undertook to set the captured crew at liberty and to punish those responsible for the aggression; although the restoration of the ship herself was prevented owing to her loss by collision (*h*). A similar duty of restitution will devolve on the Courts of the captor's State if, in the course of adjudication, it is proved that the prize was captured within the territorial waters of a neutral State. Under the British and American practice restitution in such a case will only be decreed either on the complaint of the neutral State itself (*i*), or on a disavowal of the capture by the captor's State (*k*); for the reason that even a capture in neutral waters is not deemed to be illegal as between enemies (*l*). But this limitation will not apply where the prize illegally taken was neutral; in which case the violation of neutral territory may be set up and damages claimed, irrespective of any complaint on the part of the State whose territory was violated. So, in the case of the *Sir William Peel* (5 Wall. 517), where it appeared that a British vessel had been captured during the civil war by a United States cruiser in Mexican waters, restitution was made by the United States Court without any claim on the part of Mexico; and although costs and damages were refused by the Court, yet at a later stage damages were awarded by a Joint Commission to which the question had been referred (*m*).

In the case where no restitution is made by the State or Courts of the captor, the injured belligerent has, as we shall see, certain coercive remedies against the neutral State (*n*). As between the Powers to the Hague Convention, No. 13 of 1907, moreover, an obligation to liberate both prize and crew, on the demand of the neutral Power, is now specifically imposed on the State of the captor (*o*).

(*h*) See Wheaton, Dana's ed., p. 528; Twiss, "Law of Nations," *Belligerent Rights*, 1863, ed., p. 525, 526.

(*i*) Although a claim made by a neutral would suffice, it is usually specially authorized. But under the Foreign Enlistment Act, 1870, s. 14, a prize taken by a vessel illegally fitted out in British territory may be restored on complaint of either the owner or his Government.

(*k*) *The Anna*, 5 Wheat. 435.

(*l*) See *The Independencia*, 1 Dods. 116; *The Anna*, (1 Dods. 244); *The Anna*, 5 Wheat. 435; *The Florida*, 101 U. S. 37; Scott, 688 *et seq.*; and Hall, 617, n.

(*m*) Moore, Int. Arb. iv. 3635.

(*n*) *Infra*, p. 295.

(*o*) See Art. 3, *p.* 309, *infra*.

(ii) DUTIES INCIDENT THERETO.

THE CASE OF THE "GENERAL ARMSTRONG."

[1851: Moore, Int. Arb. ii. 1071: Ortolan, Diplomatie de la Mer, ii. 300.]

Case. On the 26th September, 1814, during war between Great Britain and the United States, the "General Armstrong," an American privateer under the command of Capt. Reid, was lying in the Portuguese harbour of Fayal, in the Azores. On the evening of that day a small British squadron under Commodore Lloyd also put into that port. On the night of the 26th certain boats from the British squadron approached the "General Armstrong"; whereupon those on board the latter, after hailing the boats and summoning them to haul off, immediately fired upon them, with the result that two men were killed and several wounded. It was alleged by the captain of the privateer that these boats were "well manned and apparently as well armed"; but this was denied by the British commander, who charged the privateer with an unprovoked attack and violation of the neutrality of the port. It was not until after this engagement that any appeal for protection on behalf of the privateer was made to the local authorities. The latter thereupon communicated with the British commander, and protested against any resumption of hostilities in a neutral port. In reply they were informed that inasmuch as the "General Armstrong" had been the first to violate the neutrality of the port, a single small vessel would be told off to take her, but that if hostilities were encountered from the castle, then the whole squadron would treat the town as hostile. Accordingly, on the following day, a small brig belonging to the English squadron took up her position near the "General Armstrong," and attacked her; with the result that the latter was ultimately abandoned and destroyed by her crew, who succeeded in escaping to the shore (*a*). The United States Government sub-

(*a*) During the engagement, the crew of the privateer are stated to have used langridge, including nails and knife blades, inflicting very excruciating injuries on those who were wounded: see Halleck, i. 563, n. The defence of the privateer was also aided by her countrymen from the shore who fired on the assailants from the protection of the adjoining rocks.

sequently made a claim for compensation against Portugal for breach of duty in allowing the "General Armstrong" to be captured in neutral territory; but this was resisted by Portugal on the ground that the American vessel had herself engaged in belligerent operations. After much correspondence the affair was, in 1851, submitted to the arbitration of the President of the French Republic, who, in the result, found against the claim.

The Award.] The award of the arbitrator, after reciting the facts, and adverting more especially to the doubts which existed as to whether the boats first fired on by the "General Armstrong" were provided with arms or ammunition, proceeds as follows: "Considering that the report of the Governor of Fayal proves that the American captain did not apply to the Portuguese Government for protection until blood had been shed . . . that the Governor affirms that it was only then that he was informed of what was passing . . . that he several times interposed with Commodore Lloyd with a view to obtain a cessation of hostilities . . . that the weakness of the garrison . . . and guns . . . rendered all armed intervention on his part impossible; . . . considering in this state of things that Capt. Reid, not having applied in the beginning for the intervention of the neutral Sovereign, and having had recourse to arms for the purpose of repelling an unjust aggression of which he claimed to be (*b*) the object, thus failed to respect the neutrality of the territory of the foreign Sovereign, and released that Sovereign from the obligation to afford him protection by any other means than that of a pacific intervention; . . . from which it follows that the Government of Her Most Faithful Majesty cannot be held responsible for the results of a collision, which took place in contempt of her rights of sovereignty and in violation of the neutrality of her territory and without the local officer . . . having been requested in proper time . . . to grant aid and protection . . . ; therefore, we have decided and we declare that the claim presented by the Government of the United States against Her Most Faithful Majesty has no foundation, and that no in-

(*b*) The word used is *prétendit*.

demnity is due by Portugal in consequence of the loss of the American brig, the privateer 'General Armstrong.'"

This case is commonly treated as supporting the conclusion that if a belligerent who is attacked in neutral waters elects to defend himself, instead of trusting to neutral protection, he will free the neutral State from any further responsibility [a]. And it is no doubt true, so long as it is understood that there was a genuine election on the part of the belligerent, in circumstances where an appeal for local protection was both possible and not manifestly useless. But neither the facts nor even the terms of the award notwithstanding some ambiguities of expression, appear to warrant the conclusion that the belligerent acting in hostilities in self-defence, in other circumstances, will produce this result. Where, indeed, a belligerent himself commences hostilities in neutral waters, it is clear that he will forfeit all claim to neutral protection or possible indemnity. But neither principle nor analogy sanctions the view that the mere warding off of a possible attack, under circumstances where an appeal for local protection was either impossible or unlikely to be effectual, would deprive a belligerent of that right to protection, in that subsequently become available, which rights to indemnity in respect [illegible] [b].

If, however, the property of one belligerent has itself not been at fault, has been captured by the other in violation of neutral territory, and no restitution has been made by the State, the Courts of the captor, then a duty of restitution, or, failing this, a duty of seeking it, in certain circumstances even of making reparation, will, under the customary law, devolve on the neutral State itself. This may take one of several forms: (1) If the property in question is subsequently brought within the neutral jurisdiction, then the neutral State ought, on proof of the delinquency, to cause restitution to be made either administratively, or through its Courts of the latter, although not ordinarily competent to decide on the validity of belligerent captures, having in such a case jurisdiction, to decide questions arising [illegible] [c]. (2) Whether the neutral jurisdiction in such a case be exercised [illegible] the property having been originally the [illegible] [d]. (3) Even [illegible] [e]. (4) It

[a] Hall, 629.

[b] See *The* [illegible], vol. i. 163; and *The* [illegible] 3 Wheat. at 147; Story, 65.

[c] See [illegible] 201.

[d] See [illegible] and P. 230, iii. 564.

[e] See *The* [illegible] 5 Wheat. 385. The violation of neutrality in this case was [illegible] engagement of [illegible] on the same [illegible] applied [illegible] only to [illegible] made in neutral territory. The U. S. decisions on this subject are [illegible] in Wheaton, Digest, p. 275.

[f] The treaty [illegible] not being binding on the neutral: see Vattel, ii. 199; Hall, 630; see also Wheaton, Digest, [illegible]

would be otherwise if the vessel illegally captured had previously been commissioned as a public vessel (*j*). (2) If the property in question is not brought within the neutral jurisdiction, then under the customary law, at any rate, the neutral State whose territory has been violated will be bound, at the instance of the aggrieved belligerent, to prefer a claim for redress against the State of the captors; and, failing redress by diplomatic means, to prosecute the claim by such ulterior methods as may reasonably be expected from a State in its position (*k*). (3) Finally—and especially if there was a breach of duty on the part of the neutral State in providing protection when appealed to—it will be incumbent on it to afford compensation to the injured belligerent (*l*). At the same time the obligation as regards protection is not, it is conceived, an absolute one, but is limited to an honest use of such means as were then available for the purpose of avoiding the injury complained of (*m*). But as between States that are parties to the Hague Convention, No. 13 of 1907, these obligations are, as we shall see, in some degree modified (*n*).

(c) THE QUESTION OF SELF-REDRESS WHERE NEUTRAL HOSPITALITY IS ABUSED.

THE CASE OF "RYESHITELNI."

1904: Takahashi, 137; Smith and Sibley, 116.

The Seizure. On the 10th of August, 1904, during the Russo-Japanese war, the Russian destroyer "Ryeshitelni," having escaped from Port Arthur and being pursued by the enemy, took refuge in the Chinese port of Chefoo, which was outside the [illegible] of the war (*o*). On the 11th August, the Japanese destroyers "Asashiwo" and "Kasumi" having discovered this [illegible] entered Chefoo. On the following day, finding that no steps had been taken to disarm the "Ryeshitelni," a Japanese officer [illegible] on the Russian commander and [illegible] the alternative of either repairing Chefoo or surren-

(*j*) [illegible] p. 266.
(*k*) [illegible] p. 347.
(*l*) See Hall, 619. "As since Powers, [illegible] would scarcely be expected to [illegible] by the use of force [illegible] violate [illegible] neutrality [illegible] the [illegible] party, [illegible] was [illegible] from [illegible] [illegible]."
(*m*) This was the basis of the claim made by the United States against Portugal in the case of *The Georgia* [illegible] p. 292.
(*n*) See H. C., No. 13 of 1907, Arts. 5, 8, 25; and Westlake, ii. 263.
(*o*) See 30th and [illegible] p. 290.

dering to the Japanese. The Russian commander refused to accept either alternative, and, whilst the discussion was proceeding, ordered his men to destroy the engines and to fire the magazine, with the result that an explosion took place which damaged the fore part of the vessel and caused some casualties amongst the Japanese *b*). Hostilities then ensued, in the course of which the "Ryeshitelni" was captured by the Japanese destroyers and towed out of port. According to the Russian official report, the "Ryeshitelni" had lowered her flag and been dismantled before she was attacked by the Japanese; the action of the Russian commander being attributed to the fact that he was defenceless and desired to destroy his vessel in order to prevent her from falling into the hands of the enemy. A Chinese report, made before the attack, states that the Russian commander had agreed to disable his engines and to disarm the vessel; but it does not state that this had been actually done, whilst the fact of the magazine having exploded in the course of her seizure serves, at any rate, to show that the ammunition had not been removed from the vessel at the time of attack.

The Justificatory Memorandum issued by the Japanese Government. A protest against the seizure was subsequently made by Russia through the French Minister at Tokyo; but this Japan refused to receive on the ground that, as between States already at war, such a protest was nugatory. China also made a protest to the Japanese Government, and demanded the restitution of the captured vessel; this demand being also refused. But in view of the gravity of the occurrence Japan drew up and circulated a memorandum just [illegible]. This was, in effect, as follows: The position occupied by China in relation to the war was really anomalous. The war was being waged in part, at any rate, in and about territory belonging to China. Japan had, indeed, engaged, in the interest of foreign intercourse, to respect the neutrality of China outside the actual region of the war, but only on condition that Russia did the same. Such territory had accordingly become conditionally neutral: but a failure on the part of Russia to comply with this condition, and

b) He is also said to have seized the Japanese officer and jumped overboard, carrying the latter with him.

the occupation or use as an asylum by the Russian forces of any place within it, had the effect of nullifying this neutrality. The very fact of the "Ryeshitelni" taking shelter from attack in Chefoo constituted a breach of the neutrality of China as established by the agreement of the belligerents; and Japan was therefore justified in regarding that place as belligerent *quoad hoc*. This was, moreover, only one of a number of instances in which Russia had violated Chinese neutrality *e.g.* Japan could not consent that Russian warships should, as the result of her breach of engagement, find in the harbours of China a refuge from capture and destruction. The "Ryeshitelni," moreover, was fully armed and manned when visited by the Japanese. The case had no analogy to that of the "Florida" *d*, for the reason that Brazil's neutrality was unconditional and complete and the port of Bahia far from the seat of war. The "Ryeshitelni" was also the first to commence hostilities; and the case therefore resembled rather that of the "General Armstrong." Experience had shown that China would take no adequate steps to enforce her neutrality laws; and if the "Ryeshitelni," then other and larger Russian warships might well have sought shelter in Chefoo and have issued thence to attack Japan.

Japan [illegible] seem, bases her defence mainly on the contention that Chinese territory, even outside the region of the war, was only conditionally neutral, and that the entry of the *Ryeshitelni* into Chefoo constituted a breach of engagement by Russia and a use of that port for military purposes, which nullified its neutrality. But in fact China was wholly neutral, save as to the fact that the belligerents were fighting in and about a province that had been seized from her; whilst the contention that the entry of a warship into Chefoo constituted a military use of that place which nullified its neutrality, is on the face of it untenable. Chefoo was really outside the region of the war and in the same position as any other neutral port. Nor, having regard to the provisions of the Japanese commander, can it be said that the *Ryeshitelni* was the aggressor. Hence the seizure of that vessel was an undoubted violation of Chinese neutrality. But the contention that

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[illegible] of a radio-telegraphic station by Russia at Chefoo. [illegible] p. 291.

d [illegible] *f* [illegible] On the question whether territory as an asylum, see [illegible] p. 357.

China was either unable or unwilling to fulfil her neutral duties and that by her default she exposed Japan to serious danger, opens up a new and important question—which may need to be dealt with in the future—as to whether such a violation of neutral territory is under any circumstances legally admissible. By current usage, indeed, the only exception that is admitted to the usual immunity of neutral territory occurs in the case of self-defence against attack [*a*]. Nevertheless, in the case where a neutral Power has by its persistent infractions of neutrality shown itself unable or unwilling to discharge its neutral obligations and where the injury threatened by some immediate breach is grave and not otherwise remediable, it is conceived that an act of self-redress on the part of the belligerent whose interests are impugned, similar in its character to that which occurred in the case of the *Ryeshitelni*, would be legally admissible, as an alternative to war and on the analogy of those methods of self-redress falling short of war (often virtually measures of police) which have already been described [*a*]. Viewed in this light, and assuming the *Ryeshitelni* not to have been disarmed, the action of Japan was not perhaps without some measure of justification even though exceeding the limits of a limited usage [*b*].

General Notes. *The Inviolability of Neutral Territory.* Sovereignty over neutral territory is at once a source of right and of duty. On the one hand, a neutral State is entitled to have its territory respected, and exempt from being made either the scene of hostilities or the starting-point of any proximate act of war. On the other hand, it is bound to maintain the neutrality of its territory, both as regards its own action and the acts of all within its jurisdiction, so far as this can be done by the exercise of reasonable diligence. More particularly is it bound (1) to prevent the occurrence of hostilities or captures within its territory or territorial waters; (2) to prevent the enlistment or recruiting of men or the issue of belligerent commissions within its territory; (3) to prevent the preparation therein of any hostile expedition directed against either belligerent; (4) to prevent, within the same limits, the construction or outfit of vessels intended for the service of either belligerent, or the augmentation of warlike vessels already in such service; (5) to prevent the use of its territory or of ports as a base of hostile operations, or as a station from which to exercise control or interrupt communication; (6) to prevent the passage of troops of either belligerent across its territory, save in cases specially sanctioned by Convention as regards the sick and the wounded [*c*]. The nature and extent of these duties, as

[*a*] See p. 294.

[*b*] See H. C., No. 5 of 1907, pp. 11, 12, and as to the action of Japan, H. C., No. 2 of 1907, Art. 10.

[*c*] Lawrence, Principles of International Law, 4th ed., pp. 292, 293.

regards the conduct of hostilities or the making of captures within neutral territory, have already been indicated, whilst the other aspects of neutral duty in this connection will be dealt with hereafter. Before passing to these, however, it will be necessary to glance briefly at certain provisions contained in two of the Hague Conventions, by which the earlier law on this subject has been defined and supplemented.

The Hague Conventions: (1.) *No. 5 of* 1907. The Convention "respecting neutral Powers and persons in land warfare," whilst not attempting to deal with this matter comprehensively, yet declares or records some of the more important rights and obligations connected with neutral territory. It affirms in general the principle that the territory of a neutral Power is inviolable (*m*). It expressly forbids a belligerent to move troops, or convoys, whether of munitions of war or supplies, across the territory of a neutral Power (*n*). It forbids the erection by a belligerent, within the territory of a neutral Power, of any wireless telegraphy station, or any apparatus intended to serve as a means of communication with belligerent forces on land or sea, or the use of any installation of this kind established there by the belligerent before the war for purely military purposes and not previously open for the service of public messages (*o*). It forbids the formation of bodies of combatants, or the opening of recruiting offices, in the interest of either belligerent, on neutral territory (*p*). It further imposes on the neutral Power the duty of prohibiting all such acts, in so far as they are done within its territory and jurisdiction (*q*). But a neutral Power will not incur any responsibility by reason of persons crossing its frontier singly for the purpose of entering the service of either of the belligerents (*r*). Nor is it bound to prevent the export from or transit through its territory, on behalf of either belligerent, of arms or munitions of war, or other articles of use to a fleet or army (*s*). Nor is it bound to prevent the belligerent from using telegraph or telephone cables, or wireless telegraphy apparatus, belonging either to the neutral State or to private owners (*t*), although if it imposes any restrictions as regards their use, it will be bound to apply these to both belligerents impartially, and to see that a like use is secured by private owners (*u*). A neutral Power may allow belligerents to cause relays to be established on its territory, subject to the condition of impartiality and other conditions more particularly described hereafter (*v*). It may also authorize the passage over its territory of the wounded or sick, belonging to either belligerent army, on con-

(*m*) Art. 1.
(*n*) Art. 2.
(*o*) Art. 3. During the Russo-Japanese war, Russia established wireless apparatus at Chefoo in Chinese territory, and thereby kept up communication with the besieged forces in Port Arthur. See Lawrence, War and Neutrality, 248.
(*p*) Art. 4.
(*q*) Art. 5.
(*r*) Art. 6.
(*s*) Art. 7.
(*t*) Art. 8.
(*u*) Art. 9.
(*v*) See H. C., No. 5 of 1907, Arts. 11–13; and p. 314, *infra*.

dition that the trains carrying them shall carry neither personnel nor material of war, and subject to the adoption of such measures of safety and control as may be necessary for that purpose (*y*); the provisions of the Geneva Convention being also applicable to sick and wounded interned there (*z*). The fact of a neutral State repelling, even by force, attacks on its neutrality is not to be regarded as a hostile act (*a*). Other chapters of the same Convention deal with the duty of internment as regards belligerent troops taking refuge in neutral territory, the treatment of the wounded who may be carried there, and the rights of belligerents and neutrals as regards the seizure of railway material owned by one party and found within the territory of the other (*b*).

ii. *No. 13 of 1907.* The Convention "respecting the rights and duties of neutral Powers in maritime war" also embodies a number of provisions relating to the integrity of neutral territory and the incidental rights and duties of neutral States. Equally in maritime as in land warfare each of the belligerents is declared to be bound to respect the sovereign rights of neutral Powers, and to abstain in neutral territory or waters from any act which would if knowingly permitted by any Power constitute a violation of its neutrality (*c*). Any act of hostility, including capture or search, committed by a belligerent warship in neutral waters is declared to be a violation of neutrality and is strictly forbidden (*d*). When a ship has been captured in neutral waters, the neutral State must, if the prize is still within its jurisdiction, employ such means as it has at its disposal to release the prize with its officers and crew, and to intern the prize crew (*e*). If, on the other hand, the prize does not come within the neutral jurisdiction, then the captor's Government must on the demand of the neutral Power liberate both the prize and crew (*f*). At the same time, no duty of making such a demand is now imposed on the neutral State (*g*); apparently for the reason that as between parties to the Prize Court Convention a claim for restitution could at the instance of the neutral State be brought before the International Prize Court, by which the legality of the capture would then be determined and restitution and damages awarded if it proved to have been unlawful (*h*). Hence as between States that are parties to that Convention, it will now appear that a neutral State whose territory has been violated in a case where the prize illegally captured is not liberated by the captor's State, either makes a diplomatic claim and threatens to proceed

(*y*) Art. 14.
(*z*) Art. 15.
(*a*) Art. 10.
(*b*) Sects. 2 to 5. Arts. 6 to 19.
(*c*) Art. 1. This Convention was signed by the two Secretaries of British Plenipotentiaries, subject to ratification. Arts. 10, 17, and 18, as to the manner of ratification; see Treaty Series, No. [illegible].
(*d*) Art. 1.
(*e*) Art. 2.
(*f*) Art. 3.
(*g*) Art. 3. This was proposed by Great Britain, but not adopted; see Pearce Higgins, 461 *et seq.*
(*h*) H. C. No. 12 of 1907. Arts. 3, 4.

as under the earlier law, or else to appeal directly to the International Prize Court, in the event of that Court being established (*z*). But if the neutral State is not a party to that Convention, then its rights and obligations will continue to be governed by the rules previously described (*k*). A belligerent is forbidden to establish a Prize Court in neutral territory, or on a vessel lying in neutral waters (*l*). A belligerent is also forbidden to use neutral ports and waters as a base of operations against the enemy; and, in particular, to erect there any wireless telegraphy station or other apparatus intended to serve as a means of communication with the belligerent forces on land or sea (*m*). But the neutrality of a State is expressly declared not to be affected by the mere passage through its territorial waters of warships or prizes belonging to a belligerent (*n*). Nor, indeed, under the general law, would a neutral State be warranted in forbidding the passage of warships through its littoral seas or through straits constituting a channel of communication between parts of the open sea (*o*). The Convention expressly recognizes that a neutral State may allow belligerent warships to employ its licensed pilots (*p*); although in principle it would seem that this should be restricted to the navigation of its territorial waters (*q*). All restrictions or prohibitions imposed by a neutral State must be applied impartially, subject, nevertheless, to the right of a neutral State to exclude from its ports and waters particular vessels that have violated its neutrality or refused to conform to its rules (*r*). The exercise by a neutral State of its rights under the Convention is not to be regarded as an unfriendly act by either belligerent (*s*). Other provisions relate to the supply or export of instruments of war (*t*), the fitting out or arming in neutral territory of ships intended for the service of either belligerent (*u*), and especially the treatment of belligerent warships and prizes in neutral ports (*x*)—all of which will come under consideration hereafter in connection with other aspects of neutrality (*y*).

(*z*) See H. C., No. 12 of 1907, Art. 3 (b); and p. 195, *ante*.

(*k*) See *ante*, p. 294.

(*l*) Art. 4; *ante*, p. 132.

(*m*) Art. 5; and *ante*, p. 159; and see also No. 5 of 1907, Art. 3.

(*n*) Art. 10. Turkey, however, signed the Convention subject to a special reservation, as regards this Article, in relation to the Dardanelles (cf. Parliamentary Papers, Pearce Higgins, 469).

(*o*) See vol. i. 149.

(*p*) Art. 11.

(*q*) Pearce Higgins, 469.

(*r*) Art. 9.

(*s*) Art. 26.

(*t*) Arts. 6, 7.

(*u*) Art. 8.

(*x*) Art. 13 *et seq.*

(*y*) This Convention has been signed by thirty-nine States; Great Britain signed it, although under reservation of Arts. 19 and 23, but has not, so far, ratified it; see Table, App. xiv.

DUTIES OF NEUTRAL STATES: ABSTENTION.

CONTROVERSY BETWEEN DENMARK AND SWEDEN, 1788.

De Martens, Causes Célèbres, iii., 478; Annual Register, 1788, 292.[1]

Case. In 1788, during war between Sweden and Russia, Denmark, acting in pursuance of certain prior treaties, and more particularly a treaty of 1781, furnished Russia with troops and ships in aid of her military operations against Sweden. Concurrently, on the 23rd September, 1788, Denmark made a declaration to the effect that notwithstanding such aid she still considered herself to be at peace with Sweden: that such peace would not be interrupted by the defeat of the Danish auxiliaries; and that under these circumstances it was conceived that Sweden would have no cause of complaint so long as the troops and ships supplied did not exceed the number stipulated by treaty. To this Sweden, on the 6th October, 1788, made a counter declaration to the effect that the doctrine put forward by Denmark could not be reconciled with the law of nations or the rights of Sovereigns; and that the Swedish Government accordingly entered its protest against such action; although in order to prevent an effusion of blood between the subjects of the two kingdoms, and having regard to efforts then being made to restore peace, that Government would in the circumstances rest satisfied with the declaration of the Danish Government that it had no hostile views against Sweden. In the result, however, and on the threatened intervention of other Powers, Denmark first and recalled her forces to withdraw from Swedish territory; and later, in July, 1789, agreed with the consent of Russia to abstain from any further action [illegible].

The duty of neutral States to abstain from furnishing military aid to either party to the war would appear to be, both as to the neutral relations [illegible] and essential as to a matter of [illegible] qualification. Nevertheless, it was for a long time subject to various

[1] Although this was the main controversy, as to which see Westlake, issue between the parties, other ones [illegible] p. 177.
Cases arose in the course of the con[illegible]

exception, recognized alike by juristic opinion and in practice, under which the furnishing of troops and military aid to one belligerent was treated as permissible, so long as the neutral was bound thereto by treaty made prior to and independently of the war. And this view is still held by some writers (*b*); but since the Swedish protest in 1788, which declared the rendering of military aid by a neutral to a belligerent, even though stipulated for by prior treaty, to be a violation of the law of nations, it has been abandoned in practice. The action of Austria in 1864 in authorizing the raising within her territory of forces in aid of the Archduke Maximilian after his acceptance of the crown of Mexico is sometimes cited as an exception to the otherwise uniform observance of this rule; although it really appears to have been rather in the nature of an alliance or intervention than a breach of neutrality (*c*). At any rate, under the law as it now obtains, the furnishing of military aid, in any shape or form, by a neutral government to either belligerent is wholly forbidden (*d*).

THE CASE OF THE SWEDISH WARSHIPS, 1825.

[De Martens, Causes Célèbres, v. 229.]

Case. In 1825, during the war between Spain and her American colonies, Sweden, wishing to reduce her navy, offered to dispose of six of her warships to the Spanish Government, which did not, however, accept the offer. Subsequently three of the vessels in question were sold to local merchants, who in their turn resold them to an English firm. Before the vessels had been despatched, it was ascertained that they had been purchased on behalf of the Mexican Government, then in revolt against Spain. The Spanish Secretary of Legation thereupon complained of the transaction, and demanded that the sale should be rescinded. The Swedish Government, although originally inclined to uphold the transaction as being within its legal right, nevertheless issued instructions to the officers appointed to take the vessels to England to await further orders. In consequence of this delay the purchasers appeal, on their part, to have demanded a rescission, in which the

(*b*) Cf. Hall, 589.

(*c*) For a proposed treaty by the United States, 1867, etc., "friendly, fraternity and union alliance with Maximilian in his invasion: see Wharton, Dig. iii. 551.

(*d*) See H. C., No. 13 of 1907, Art. 6; and, on the subject generally, Hall, 589; Oppenheim, ii. 289.

Swedish Government acquiesced, with the result that the proposed sale was finally abandoned.

Sweden, it will be observed, had sold the vessels *bonâ fide* and in ignorance of their ultimate destination; and her subsequent action in the matter, with its implicit recognition of the correctness of the Spanish contention, may probably be said to mark the starting-point of the existing rule. This, as now embodied in the Hague Convention, No. 13 of 1907, forbids a neutral Power, whether directly or indirectly, to supply a belligerent with warships, ammunition, or other war material *(a)*. Under the customary law, however, the precise scope of this rule was not so well ascertained. In October, 1870, the United States Ordnance Department, acting under a prior resolution of Congress, sold by public auction a great quantity of surplus war material, of which a large proportion *(b)* was purchased by France, then at war with Germany, and paid for through the French consul. It having been alleged that this constituted a breach of neutral duty, the matter was referred for enquiry to a committee of the Senate, which reported in effect that the sale in question involved no violation of the neutral obligation, for the reason that the immediate purchasers were not the agents, or were at any rate not known by the United States Government to be the agents, of the French Government. It was added, moreover, that, even if they had been such agents and if the fact had been known, it would still have been lawful for the United States Government, in pursuance of a national policy adopted prior to the commencement of hostilities, to sell war material either to them or even to the belligerent sovereigns directly, so long as this was done in pursuit of its own interest, and without intent to influence the strife *(c)*. Despite this opinion, however, it would seem even under the customary law, that if, during war betwen States, a neutral Government sells warships or war material, a strong implication will arise (having regard to the fact that such objects are not ordinarily required for private purposes) of a destination to the use of one or other of the belligerents; and that such a disposition will therefore constitute a breach of neutral duty towards one belligerent, if the ships or material in question come into the hands of the other, unless the neutral Government can show that all reasonable precautions were taken to prevent this *(d)*. Even where such a purchase has been effected before the outbreak of hostilities, it will be incumbent on the neutral Government to refuse delivery during the continuance of the war. It was in deference to these rules that the British Government, during the American civil war, stopped the sale of its surplus warships, in view of the possibility of their purchase by one of the belligerents, acting through the medium

(a) See Art. 6; and p. 305, *infra*.

(b) Including some 378,000 muskets and 55 cannon.

(c) See Wharton, Dig. iii. 512 *et seq.*

(d) As to the effect of the H. C. No. 13 of 1907, see *infra*, p. 305.

of private agents (*d*). Again, during the Russo-Japanese war, the Argentine Government is stated to have broken off negotiations for the sale of certain of its war vessels on discovering that one of the negotiators, although purporting to be acting on behalf of Turkey, was really acting in the interest of one of the belligerents (*e*). During the same war, however, several vessels belonging to the North German Lloyd Co. and the Hamburg-American Co., some of which were under engagement to the German Government for service in war, were sold to Russia, and thereafter converted into armed cruisers. The legality of the sale was upheld by the German Government as a purely commercial transaction, and Japan does not appear to have made any protest (*f*). Nevertheless, it would seem that the sale to a belligerent of vessels which, even though belonging to private owners, are under engagement to the State for service in war and which cannot be disposed of without its consent, really constitutes a violation of the rule; for the reason that the neutral Government, in giving its assent, virtually becomes a party to the sale, and hence to the supply to one of the belligerents of an instrumentality of war (*g*).

General Notes. *Acts which a Neutral State must itself abstain from doing.*– Apart from obligations specially connected with neutral territory, which have already been considered (*h*), the more prominent duties of a neutral State, in its public action, are these:– (1) It must not give armed assistance to either belligerent, a duty which is, as we have seen, now insusceptible of qualification (*i*). (2) It must not, as the Hague Convention, No. 13 of 1907, now expressly provides itself supply either belligerent, in any manner, and whether directly or indirectly, with warships, ammunition, or war material of any kind (*k*); which would appear to have the effect of making the obligation an absolute one, instead of merely conditional on due precautions being taken, as under the customary law (*l*). It is not, however, under any obligation to prevent such supplies being furnished by its subjects, or "to prevent the export or transit on behalf of either belligerent of arms, munitions of war, or in general of anything which could be of use to an army or fleet" (*m*). Nor is it bound "to forbid or restrict the employment on behalf of belligerents of telegraph or telephone cables, or wireless telegraphy apparatus, whether belonging to it or to companies or private individuals" (*n*). (3) Finally, it must not lend money to, or promote or guarantee any

(*d*) Parl. Papers 1873, N. A. No. 2, 101–105.
(*e*) Takahashi, 486.
(*f*) Takahashi, 488.
(*g*) See H. C., No. 13 of 1907, Art. 6; but see also Oppenheim, ii. 344.
(*h*) *Supra*, p. 298.
(*i*) *Supra*, p. 303.
(*k*) Art. 6.
(*l*) *Supra*, p. 304.
(*m*) H. C., No. 13 of 1907, Art. 7; H. C., No. 5 of 1907, Art. 7.
(*n*) *Ibid.* Art. 8; but as to restrictions, see *supra*, p. 299.

loan on behalf of, either party to the war. Hence, as early as 1789, the United States Government, in sending a mission to the French Republic with a view to the settlement of certain differences then subsisting between the two Governments, instructed its envoys that in view of the war then prevailing between Great Britain and France no treaty was to be purchased by loan of money or otherwise, on the ground that such a loan would violate the neutrality of the United States (*p*). But there is, as we shall see, no obligation to prevent such loans being made by neutral individuals, so long as they are made purely as commercial transactions (*q*).

The Duty of Impartiality. Neutrality, as regards the public action of a State, also involves a duty of strict impartiality. This covers generally the equal treatment of both parties; and consists more particularly, as regards rights and restrictions that are discretionary (*r*), in affording no right to one party that is denied to the other, and in imposing no restriction on one that is not imposed on the other. And in such cases the neutral State is equally bound to see that a like impartiality is observed by its subjects (*s*).

PREVENTION.

I. THE ENLISTMENT OF MEN, AND THE ISSUE OF COMMISSIONS WITHIN NEUTRAL TERRITORY.

CONTROVERSY WITH RESPECT TO THE ACTION OF M. GENET, THE FRENCH MINISTER TO THE UNITED STATES, 1793.

American State Papers: Foreign Relations, vol. i. 47, 116, 118, 150; Wharton, Digest, iii. 545 (2nd ed.); Moore, Digest, vii. 889, 896.]

Circumstances leading to Controversy. Soon after the outbreak of war between Great Britain and France in 1793 the

(*p*) See American State Papers, ii. 204; and, on the subject generally, Hall, 589; Oppenheim, ii. 430; Westlake, ii. 177.

(*q*) *Infra*, p. 267. Although in a case where the consent of a Government is required in order to legalize the raising of, or perhaps even the equipping or fitting out made by its subjects in foreign States, it would seem that such consent cannot strictly be given to a loan raised on behalf of a belligerent without involving the neutral State, for the person that in giving its assent the Government makes itself in effect a party to the transaction: see Westlake, ii. 177.

(*r*) Such as the right to employ licensed pilots or to deposit prizes in neutral ports: see H. C., No. 13 of 1907, Arts. 9, 11, 23.

(*s*) As to the impartial enforcement of restrictions on the export or transit of war material and the use of telegraphic apparatus, if imposed, see H. C., No. 5 of 1907, Arts. 7–9, and No. 13 of 1907, Art. 9.

President of the United States issued a proclamation of neutrality, which, amongst other things, prohibited United States citizens from aiding or abetting hostilities that were then proceeding between the belligerents. Notwithstanding this proclamation, M. Genêt, the French Minister accredited to the United States, on arriving at Charleston, proceeded to issue commissions to United States citizens: to authorize the fitting out privateers, which were manned almost entirely by American residents: and also to establish prize courts in United States territory. The British Minister thereupon complained to the United States Government; expressing his persuasion that the latter would regard such proceedings on the part of a foreign State as a violation of its neutrality, and demanding the restitution of all vessels which had been captured by privateers sailing under M. Genêt's commissions and brought into the United States ports. In dealing with this demand, that Government was embarrassed both by the fact that there existed at the time no legislation in restraint of such proceedings, the powers of the executive resting solely on the common law as supplemented by the law of nations: and by the fact that under a treaty made with France in 1778, during the War of Independence, France claimed the right of fitting out vessels and depositing prizes in the ports of the United States. Despite these difficulties the Government expressed its disapproval of the practices complained of (*a*), and promised the British Minister that in future steps would be taken to prevent them. In pursuance of this undertaking it informed the French Government that recruiting in United States territory was forbidden (*b*); and notified M. Genêt that "the granting of military commissions within the United States by any other authority than their own" was an infringement of their sovereignty (*c*); whilst it also took the necessary steps for restoring all prizes found within the United States jurisdiction, which had been taken by vessels illegally commissioned or recruited.

(*a*) The Government, as regards complaints of the sale of arms and war material by American citizens to French agents, took up the position that its citizens were free to make and vend such articles and that it could not interfere with mere commercial transactions.

(*b*) 15th May, 1793.

(*c*) 5th June, 1793. This communication was formally addressed to the U. S. Minister in France, but a copy was sent to M. Genêt.

This led to a remonstrance on the part of the French Minister, who claimed, under the treaty of 1778, a right of arming and enlisting men in United States ports: but this interpretation of the treaty was denied by the United States Government, and the recall of M. Genêt was soon afterwards demanded. In a communication made on the 16th August, 1793, through its Minister in Paris, the United States Government further declared that "the right of raising troops, being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign Power or person can levy men without its consent; and that if the United States have the right to refuse permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise it." Acting on this view the Government issued instructions forbidding the furnishing of any equipment of a nature solely adapted for war, and also forbidding the enlistment within its territory of inhabitants of the United States (*d*).

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This enunciation of neutral duty probably went farther than the usage of States at that time required. Nevertheless, if taken in conjunction with the action that followed, it may be said to mark the starting-point of the existing rules on the subject of illegal enlistment and armament in neutral territory; just as at a later time the *Alabama* dispute and the incidents to which it gave rise may be said to have laid the foundation of the existing rules with respect to illegal shipbuilding. Indirectly, also, it led to the passing of the United States Neutrality Act, 1794, which in its turn became the foundation of the neutrality legislation which now obtains in both the United States and Great Britain. The immediate cause of the Neutrality Act of 1794, however, lay in the discovery, through the action of the Courts, that the existing law as regards the enforcement of the duties to which the Government stood committed was inadequate. In the case of *Gideon Henfield* (Whart. St. Tr. 49), the defendant, who was a United States citizen, had enlisted on one of the privateers illegally fitted out by M. Genêt and had thereafter taken part in the capture of a British vessel; for this he was subsequently indicted at the instance of the Government, but was, under the law as it then obtained and hence under the only ruling open to the Court, acquitted. This acquittal was treated by the French Minister and his friends as entailing on the Government the obloquy of having attempted to enforce measures which the law did not warrant. In consequence of this th

(*d*) See Wheaton (Dana), 215, n., at p. 439.

President appealed to Congress for special legislation on the subject. This led to the passing of the first Neutrality Act of 1794, which, after remaining in force for a considerable time, was replaced by the Neutrality Act of 1818 (*e*). This example was not without its effect on Great Britain, where there had previously been no true or adequate neutrality laws (*f*); and led soon afterwards to the passing of the Foreign Enlistment Act of 1819, which was in its turn, although at a much later date, replaced by the Foreign Enlistment Act of 1870. This legislation has, as we shall see, exerted a marked influence both on international usage and convention (*g*).

General Notes.—*The Enlistment of Forces in Neutral Territory.*—The duty of a neutral State to prohibit the levy of men within its territory for the service of either belligerent, came, as we have seen, to be fully recognized, even under the customary law (*h*). In affirmance of this, the Hague Convention, No. 5 of 1907, now expressly declares that corps of combatants must not be formed, nor recruiting offices opened on the territory of a neutral Power, in the interest of the belligerents (*i*), and that it is the duty of a neutral Power to prohibit this (*k*). A neutral Power will not, however, incur responsibility merely by reason of persons crossing the frontier singly in order to enter the service of a belligerent (*l*); but it would be expected to prohibit or take precautions against any such movement on the part of a considerable body of its subjects (*m*). It is sometimes laid down that a belligerent warship may lawfully ship in a neutral port a sufficient number of men to enable her to navigate safely to a port of her own country (*n*); but although she may take stores or fuel for this purpose, it would seem that any addition to her crew from neutral sources must now be regarded as illegal (*o*).

(*e*) *Infra*, p. 377.

(*f*) *Infra*, p. 371, n. (*c*).

(*g*) *Infra*, p. 343-4; and on the subject generally, Taylor, 643, 644, 646 *et seq.*

(*h*) *Supra*, p. 308; Taylor, 667 *et seq.*

(*i*) Art. 4.

(*k*) Art. 5.

(*l*) Art. 6; although even this is sometimes forbidden by municipal law.

(*m*) This both by implication of Art. 6, and under the customary law: see Taylor, 669.

(*n*) See Hall, 593.

(*o*) See H. C., No. 13 of 1907, Art. 18.

(ii) THE ISSUE FROM NEUTRAL TERRITORY OF HOSTILE EXPEDITIONS.

THE TERCEIRA AFFAIR.

[1830; Hansard, N. S. xxiii. 737, xxiv. 126; Phillimore, iii. 287.]

Facts. In 1827, Don Pedro, the then King of Portugal, having elected for the crown of Brazil, formally renounced the throne of Portugal in favour of his daughter Donna Maria, and appointed his brother, Don Miguel, to the office of Regent. In 1828, Don Miguel caused himself to be proclaimed King, with the result that the country fell into a state of civil war. In the struggle that ensued, Great Britain, notwithstanding that her intervention was requested both by Brazil and by the adherents of Donna Maria, maintained a strict neutrality (*a*). Subsequently a large number of Portuguese refugees, most of them military men, arrived in England, and thereupon began to provide ships and to collect and organize men, as for the purpose of a military expedition. The British Government, suspecting that this movement was directed against the Government of Portugal with the cognizance of that of Brazil, and regarding this as a violation of its neutrality, gave notice to the Brazilian Minister that the setting forth of such an expedition would not be permitted; but in reply an assurance was received that both ships and troops were about to proceed to Brazil. In view of this assurance, four vessels, having on board 652 officers and men under the command of General Saldanha, but unarmed and apparently destined for Brazil, were allowed to leave Plymouth. Subsequently it came to the knowledge of the British Government that the expedition was in fact destined for Terceira (*b*); that arms, which had been sent on from another port, were awaiting it at or near Terceira; and that its real object was to attempt from thence a reconquest of Portugal in the interest of Donna Maria. Thereupon a small naval force under Captain Walpole was des-

(*a*) An interruption, indeed, occurred owing to [illegible] British and Portuguese [illegible] was brought to an end by the Portuguese Government making amends.

(*b*) A Portuguese possession, which had remained loyal to Donna Maria

patched to Terceira, with instructions to prevent the expedition from landing, and to use all necessary force for that purpose. The expedition under General Saldanha was not, in fact, overtaken until it had arrived in Portuguese waters; but in the result, and after some display of force by the British commander *c*, it was prevented from disembarking, and thereafter, and notwithstanding the protests of its leaders, escorted back to Europe.

Proceedings in Parliament. The legality of these proceedings was subsequently questioned in the House of Commons, on the grounds (1) that the expedition consisted of unarmed merchantmen, unaccompanied by any naval force, and without arms or munitions of war; (2) that the actual interception of the landing of the expedition at Terceira constituted a violation of the sovereignty of a foreign State; and (3) that the subsequent coercion and exercise of control over it on the high seas constituted an assumption of jurisdiction which was neither warranted by the necessity of the case nor sanctioned by the law of nations. In the House of Lords the legality of the proceeding was challenged on similar grounds; whilst its propriety was also questioned on the ground of its having been directed against the unarmed subjects of a Sovereign whose rights were favourably regarded by Great Britain. In vindication of the action of the British Government it was contended (1) that a warlike expedition had in fact been fitted out on British territory; (2) that it had been equipped and allowed to leave only under cover of a fraudulent pretence that it was destined for Brazil; and (3) that Great Britain was therefore bound by her duties as a neutral to prevent it from disembarking, even in a harbour of the Queen of Portugal's dominions. In the result the action of the Government was approved by a majority in both Houses; although the resolution moved in the House of Commons—in so far as it affirmed the illegality of the methods actually employed—is commonly regarded as a correct exposition of the law.

The two questions in issue in this case were—(1) whether the expedition in question constituted a "hostile expedition" such

One shot only was fired, with the result that one member of the expedition was killed and another wounded.

as a neutral State (*d*) was bound to prevent; and (2) whether Great Britain was justified in intervening at the time and under the circumstances described. With respect to the former question, it is clear that the proceedings had all the characteristics of a hostile expedition. Ships had been provided and men collected and organized in neutral territory, and had subsequently been despatched therefrom, with the intention, there formed, of engaging in hostilities against a friendly Government; and, although the expedition was unarmed at the time of starting, it appears that the requisite arms were forwarded as merchandize from another port with a view to their subsequent employment by the forces in question. But apart from this, and even if the arms had been provided locally and after the landing of the expedition, it would none the less seem that the expedition was one which a neutral State was bound to use all necessary diligence to prevent and detain. With respect to the second question, however, it seems that even if the expedition was an illegal one, the intervention as it actually occurred was altogether irregular; and that the British Government attempted to remedy the consequences of its previous lack of caution by proceedings, which involved at one time an infringement of the territorial rights of a foreign Sovereign and at another an illegal assumption of jurisdiction on the high seas (*e*).

General Notes.—*Hostile Expeditions.*—A neutral State is bound to prevent the preparation within its territory or jurisdiction of any military expedition or enterprise directed against the territory or Government of a friendly Power. The essentials of such an expedition would appear to be—a collection or combination of men, organized on neutral territory, with some immediate or ultimate provision for their armament (*f*), undertaken with a view to some proximate act of war against a friendly Power (*g*). And this will be so even though the members of such a combination are not, on leaving neutral territory, sufficiently organized or equipped to be able to engage in immediate hostilities (*h*). Nor will it matter that the combination was effected in small units, or at different places in the same territory, so long as it forms part of one scheme and its members are capable of proximate combination; although this may,

(*d*) For although there was not strictly an international war, both parties were recognized as belligerent.

(*e*) As to seizures beyond territorial waters for breaches of municipal law, see vol. i. 169, and for breaches of neutrality, *The Hatteras*, Moore, Int. Arb. iii. 3067, and p. 379, *infra*.

(*f*) The armament itself need not be on neutral territory, so long as it forms part of the scheme originally planned there.

(*g*) See Taylor, 679; but see also Bernard, Neutrality of Great Britain during the American Civil War, 399, where the essentials given differ somewhat from those suggested in the text.

(*h*) See *Wilhora* v. *U. S.* (163 U. S. at 653), although this decision was strictly on a question of municipal law.

of course, render detection and proof of delinquency more difficult. But the departure from neutral territory of individuals, even though in considerable numbers and on a belligerent destination, who are wholly unorganized and not acting in combination with each other, will not constitute a hostile expedition. So, when in 1870, during the Franco-German war, the *Lafayette*, a French steamer, left New York, having on board some 1,200 conscripts for the French army together with a large quantity of rifles and cartridges, the United States Government rightly refused to interfere; holding that the conscripts were not an organized force, and that the munitions of war were merely contraband (*i*). In any case, moreover, having regard to the fact that the true character of such expeditions is usually disguised or concealed until they have left neutral territory, the responsibility of the territorial Power would appear to be limited to cases where it either was, or by the exercise of reasonable vigilance might have become, aware of the illegal use to which its territory was being put (*k*). For neither in this, nor in any other case not covered by positive rule, can a neutral State justly be held responsible for acts done within its territory which only become noxious by reason of some subsequent combination outside, unless there was at the time sufficient evidence of the contemplated illegality to put the neutral Government on its guard and to justify its intervention (*l*).

The Passage of Troops over Neutral Territory. Akin to this is the duty of a neutral State to forbid the passage of troops belonging to either belligerent through its territory. This rule, although only gradually established (*m*), is now fully recognized, both under the customary law (*n*), and by the Hague Convention, No. 5 of 1907 (*o*). So, in 1870, during the Franco-German war, Switzerland denied passage through her territory to bodies of Alsatian conscripts for the French army, notwithstanding that they were without arms or uniforms. During the same war Belgium, also, on the protest of France and after consulting Great Britain, refused to allow Germany even to pass her wounded across Belgian territory, on the ground that this would have facilitated the passage into France of efficient troops by the routes thus set free. In 1877, indeed, Roumania, during the Russo-Turkish war, granted passage over her territory to Russian troops, but this was really only a prelude to joining Russia in the war. The grant of passage by Portugal in 1899, during the South African war, to the British colonial troops which had been landed at Beira and the question of its legality have already been dis-

See Hall, 603; and *Wheaton* v. *U. S.*, 163 U. S. 632).

(*k*) On the subject generally, see Westlake, ii. 192 *et seq.*; and Taylor, 678 *et seq.* The American cases are summarized in Moore, Digest, vii. § 1299. The question of the fitting out and despatch of armed vessels is now the subject of special rules, as to which see p. 344, *infra*.

(*l*) See Hall, 604 *et seq.*, and, now, H. C., No. 5 of 1907, Art. 5.

(*m*) Taylor, 669; Hall, 594.

(*n*) Subject to some occasional aberrations not purporting to rest on any basis of right.

(*o*) Art. 2.

cussed (*p*). The Hague Convention, No. 5 of 1907, now expressly forbids belligerents to move across the territory of a neutral Power either troops or convoys, whether of munitions of war or supplies (*q*), but at the same time declares that a neutral State may authorize the passage over its territory of the wounded or sick belonging to either belligerent on condition that the trains bringing them shall carry neither combatants nor material of war (*r*).

Asylum in Neutral Territory. In relation to land warfare, the question of asylum may arise either as regards belligerent forces in the mass, or isolated refugees, or prisoners of war. As regards belligerent troops that seek refuge in neutral territory, under the customary law the neutral State was under no obligation to receive them, although it was at liberty to do so if it thought fit, on condition of disarming and interning them in such a way as to prevent them from taking any further part in the war; the conditions of their reception being usually regulated by special Convention. So, in 1871, when the remnant of General Bourbaki's army, comprising some 85,000 men, sought refuge from the enemy by passing across the Swiss frontier, they were allowed to remain on condition that they should be disarmed and interned, and that the cost of their maintenance should be defrayed by the French Government on the conclusion of the war (*s*). As regards individual refugees, under the customary law a neutral State was also bound to disarm them and to adopt measures for preventing them from rejoining their own forces (*t*); although in this case the difficulty of detection was greater and the obligation consequently not so uniformly observed (*u*). As regards prisoners of war, under the customary law these, whether brought into neutral territory by their captors or reaching it after escape, were deemed in either case to recover their liberty; although the territorial Power was bound to take all reasonable precautions to prevent them from rejoining their own army (*x*). In certain particulars, however, the conditions on which asylum may be granted are now defined by the Hague Convention, No. 5 of 1907. As regards fugitive troops, this Convention provides that the neutral State shall intern them if possible at a distance from the theatre of war, keeping them in camps, or even in fortresses or other places assigned for that purpose, with discretion, however, to leave the officers at liberty on giving their parole not to leave neutral territory without permission (*y*). In the absence of special Convention the neutral Power is required to supply them with food, clothing, and such relief as the dictates of humanity may require;

(*p*) See vol. i. 111; and on the subject generally, Hall, 594 *et seq.*; and Taylor, 669.

(*q*) Art. 2.

(*r*) Art. 14.

(*s*) These terms having been embodied in a Convention made between the French commander, General Clinchant, and the Swiss commander, General Herzog: see Taylor, 672; Oppenheim, ii. 415.

(*t*) That is, from neutral territory.

(*u*) See Oppenheim, ii. 413.

(*x*) See Oppenheim, ii. 410.

(*y*) Art. 11.

all incidental expenditure being reimbursed to it by the Government to which they belong on the restoration of peace (*c*). As regards prisoners of war who escape into neutral territory, the same Convention provides that a neutral Power which receives them must leave them at liberty; but if it allows them to remain in its territory then it may prescribe their place of residence. And the same rule is applied also to prisoners of war who are brought into neutral territory by a belligerent force which itself takes refuge there (*a*). Wounded and sick belonging to one belligerent who are brought into neutral territory by the other will cease to be prisoners of war; but they must be so guarded by the neutral Power as to ensure their not taking any further part in the war (*b*). A similar duty will devolve on the neutral Power with respect to the sick or wounded of either army who may be committed to its care (*c*). The provisions of the Geneva Convention also apply to sick and wounded interned in neutral territory (*d*). The question of asylum in relation to sea warfare will be considered hereafter (*e*).

(iii) THE USE OF NEUTRAL TERRITORY AS A BASE OF OPERATIONS.

CONTROVERSY BETWEEN FRANCE AND JAPAN WITH RESPECT TO THE USE OF FRENCH PORTS AND WATERS BY THE RUSSIAN FLEET DURING THE RUSSO-JAPANESE WAR.

1905: Hershey, International Law and Diplomacy of the Russo-Japanese War, 188–198.

Voyage of the Russian Fleet to the East. On the 16th October, 1904, the first division of the Baltic Fleet, comprising a large force of battleships, cruisers, and auxiliary vessels, under the command of Admiral Rojdestvensky, sailed from Libau for Vladivostock. On the 15th February, 1905, this was followed by a second division, made up of less effective vessels, under the command of Admiral Nebogatoff (*a*). This undertaking, involv

(*a*) Art. 12.
(*b*) Art. 13.
(*c*) Art. 14.
(*d*) The terms used are "the other army"; see Art. 14; but the sense is conceived to be as stated in the text.
(*d*) Art. 15.
(*e*) See p. 357, *infra*.
(*a*) The total force included eight battleships, three coast defence ships, and nine cruisers, together with hospital ships, repairing ships, transports and other auxiliaries, having on board some 18,000 men.

ing as it did a sea journey of some 17,000 miles, with the risk of incidental hostilities, and without the aid of any national port for the procuring of supplies or for refitment or repairs, rendered it necessary to rely for these purposes either on the hospitality of neutral ports, or on vessels which accompanied the fleet or were sent to meet it at various stopping places. Admiral Rojdestvensky's fleet, after stopping at Cherbourg in France, and Vigo in Spain, arrived at Tangier on the 1st November. There the fleet again divided; one division under Admiral Foelkersahm proceeding to Madagascar by the Suez Canal, and coaling at Algiers and Port Said: whilst the other, under Admiral Rojdestvensky, proceeded by the Cape of Good Hope, coaling at Dakar in French West Africa and at Swakopmund in German South-West Africa. These divisions subsequently re-united: and thereafter the whole fleet remained at Nossi-Be in Madagascar, for the purposes of drill and training, from the 5th of January to the 16th of March: anchored, indeed, outside the three mile limit, but maintaining nevertheless close communication with the shore, and receiving from there supplies other than coal (*b*); a proceeding which gave rise to much dissatisfaction on the part of Japan. On the 12th April the fleet arrived at Kamranh Bay in French Indo-China, where it remained for ten days, taking supplies of coal and provisions from colliers and transports, although coal is said also to have been obtained from a depôt previously established by Russia near Saigon (*c*). In consequence, apparently, of the representations which had meanwhile been addressed to the French Government by Japan, the Russian fleet was required to leave Kamranh Bay on the 22nd April, but it appears to have remained off the coast, and even to have taken up its station at Hon-hoye Bay, a deep-water harbour about fifty miles north of Kamranh Bay, until the 8th of May, when it was reinforced by the arrival of the second squadron under Admiral Nebogatoff. After this it proceeded on its voyage until, on the 27th May, 1905, it was encountered and almost completely destroyed by the Japanese fleet in the Straits of Tsushima.

b. This was furnished by colliers attached to the fleet or sent to meet it.
c. See Hershey, 193.

Controversy. Japan meanwhile made a formal protest to the French Government against the use that had been made of French territory and waters, and the consequent violation of French neutrality, by the Russian fleet in the course of its voyage to the East. More particularly, complaint was made of (1) the treatment accorded to the fleet in the matter of the coal supplies; (2) the fact that it had been allowed at various places to effect repairs; (3) the use of French waters for strategical purposes, such as the junctions of the fleets; and, more especially (4) the use of French territory and waters as a base of operations. The Japanese protest concluded by pointing out that although Japan did not ignore the complexity of questions of maritime neutrality or France's predilection for her own particular rules, she nevertheless considered that the aid given to Admiral Rojdestvensky had, owing to defective surveillance, greatly assisted his mission as well as his advent into the Chinese seas. France in reply contended in effect (1) that the Russian Fleet had never used the privilege of coaling at French ports, except at Algiers, where a small supply was taken by two torpedo boats; (2) that the repairs allowed to be made at Cherbourg and Majunga in Madagascar were not in excess of what international practice allowed; (3) that the junctions of the various Russian squadrons had not been effected in French waters; and (4) that French territory and waters had not been allowed to be used as a base of operations, for the reason that there had been no continuous use. It was further pointed out that it was Admiral Togo's choice of a field of battle that had led to the Russian stay in French waters, and that if Admiral Togo had decided to meet the Russian fleet in the Red Sea, Japan would have profited by the same advantages as the Russians had enjoyed; whilst Japan herself had previously made a similar use of neutral waters both in the Philippines and the Dutch Indies.

The limits within which a maritime belligerent may use neutral ports and waters for supplies and repairs will be considered in detail hereafter. At this point it will be sufficient to notice that even a use that would be otherwise permissible will become illegal if it is so constant or prolonged or occurs under such circumstances, as to indicate that the belligerent is really using the

neutral territory as a "base of operations" against his foe. Applying this principle to the proceedings of the Russian fleets, one cannot fail to perceive that, although some other neutral ports were resorted to, there was throughout a deliberate selection of ports in French territory; and that there was a prolonged use of some ports as well as a repeated use of different ports of the same State. Moreover, even though the training of the crews, the shipping of supplies, and the junction of the squadrons, may have taken place outside the three-mile limit, there can be little doubt that these operations were greatly facilitated by the communications that were maintained with and through French territory; whilst it is probable that some supplies of coal, at any rate, were irregularly obtained (*e*). Without such a use of French territory, in fact, it is unlikely that the Russian fleet would have reached Eastern waters even in that limited state of preparation and equipment which it had attained prior to the battle of Tsushima. The exact limits of neutral duty in this connection were not, indeed, at the date of these occurrences, so well defined as they have since become; but, even if we make due allowance for this, the facilities afforded to the Russian fleet appear to have gone beyond the limits conceded by any usage reasonably consistent with the objects of neutrality. Nor can the lack of adequate municipal regulations, or default on the part of the local authorities in such a case, exempt a State from its international responsibility. Equally inconclusive is the plea put forward that similar privileges would have been at the disposal of Japan; for, as we have seen, no aid or privilege inconsistent with strict neutrality can be extended to one belligerent on the plea of being equally available to the other (*f*).

General Notes. *The use of Neutral Territory as a Base of Operations: (i.) In Land Warfare.* In general a "base of operations" denotes a place or a local position which, in military or naval operations, serves as a point of departure and return, with which a connection may be kept up, and which may be fallen back on in case of need for shelter or supplies or a renewal of operations (*g*). And it is in this sense that the term is used in relation to the question of neutral duty in land warfare. As regards war on land, the duty of a neutral State to prohibit such a use of its territory was fully recognized under the customary law. Hence the Hague Convention, No. 5 of 1907, does not expressly deal with this question, save for forbidding the collection of forces on neutral territory, and its use for the purposes of belligerent communication (*h*). The duty of a State in this regard extends by analogy also to the case where hostilities are threatened or carried on against a friendly Power in the course

(*e*) See p. 316.
(*f*) See p. 284.
(*g*) See Moore Int. Arb. iv. 4100; Art. *Basis de Operaciones*, Gasca, *sapra*.
(*h*) Arts. 3, 4; and p. 299, *infra*.

of civil war or insurrection, even though in strictness there may be no subsisting relation of neutrality. It is indeed in such cases that instances of its breach in modern times have been most frequent. The United States, for instance, may be said to have been guilty of a violation of this duty as against Great Britain in 1838, and again in 1866, in allowing the Fenian insurgents to collect and organize their forces on American territory, to make descents from there on unprotected parts of Canada, and to retire there when defeated (*i*).

(iii.) *In Sea Warfare.* In maritime war, the term "base of operations" must, in view of the peculiar conditions of sea warfare, probably be regarded as having a somewhat wider meaning. The Hague Convention, No. 13 of 1907, following the second rule of the Treaty of Washington, 1871 (*k*), provides that belligerents are forbidden to use neutral ports and waters as a base of operations against their adversaries (*l*); and further requires the neutral State to exercise such vigilance as the means at its disposal permit to prevent any violation of this rule (*m*). Some applications of this rule are sufficiently obvious. If, for instance, a belligerent cruiser were to take up its station in neutral waters for the purpose of making descents on passing vessels this would constitute an illegal use of neutral territory, and, if knowingly suffered by the neutral, also a breach of neutral duty towards the other belligerent (*n*). Beyond this the term "base of operations," in sea warfare and in relation to the question of neutral duty, would appear to include any place or local position which is used by a maritime belligerent for the purpose of preparing some hostile operation or succession of operations against the enemy, even though it may not serve or be intended to serve for the purposes of reinforcements or as a refuge in defeat. It connotes, however, a use which is either prolonged or repeated (*o*). Hence it will not extend to the mere taking of supplies on a particular occasion, however needful those may be for some subsequent operation of war; for this would render a neutral State responsible for consequences which it could not foresee at the time (*p*). But in maritime war it would seem that neutral territory may be regarded as serving as a base of operations if a belligerent is allowed to make a repeated use even of different ports or places in the same country. If this be so, then a use of neutral territory

(*i*) See Hall, 215, n. As to the "organization of filibustering expeditions" in the United States against Cuba, see Wheaton (Boyd), 586 *et seq.*, and for diplomatic discussions with regard to them, Moore, Digest, vii. 963; and, as to the use of Greek territory for feeding the insurrection against Turkey in Crete, Hall, 599. See *Introduction*, p. 326.

(*k*) See Art. 5; and as to the erection of wireless telegraphy apparatus, p. 299, *supra*.

(*l*) Art. 5.

(*m*) Art. 25.

(*n*) See Oppenheim, ii. 401; Moore, Digest, § 1301.

(*o*) It differs from a use of neutral territory for the preparation of a hostile expedition, although one often includes the other, both in this respect, and in so far as it does not necessarily involve any combination of previously disconnected units.

For an instance of such a contravention, see pp. 335, 338, *infra*.

and its resources, which would be permissible if each occasion were considered separately, may become illegal, and may constitute a use of that territory as a base of operations, if it can be shown that such a use was constantly repeated for the purpose of carrying out some particular naval operation (*q*). If, again, a neutral State habitually allows one belligerent to disregard recognized restrictions as regards the use of its ports and the taking of supplies of fuel or provisions, it will be open to the other belligerent to treat these breaches, when taken together, as evidence of the more serious delinquency of allowing its territory to be used as a base of operations.

The prohibition of the use of neutral territory as a base of communication by the erection of wireless telegraphy stations, or any similar apparatus, has already been referred to (*r*).

(iv.) THE CONSTRUCTION AND EQUIPMENT OF VESSELS OF WAR IN NEUTRAL TERRITORY.

THE GENEVA ARBITRATION AND AWARD.

[1872; Moore, Int. Arb. i. 495–682, iv. 4057–4178; Parl. Papers, N. A., 1872; Papers relating to the Treaty of Washington, 1872–3; Wheaton (Dana), 567—580.]

Circumstances leading to Arbitration. During the American civil war, the United States Government on various occasions made representations to the British Government with respect to certain acts of unfriendly or unneutral conduct alleged to have been committed by the latter, and also with respect to a variety of acts alleged to have been committed by persons within its territory and jurisdiction in violation of its neutrality. The nature and history of these charges, in so far as they concern the recognition by Great Britain of the belligerency of the Southern Confederacy, have already been considered (*s*). Other charges, which proved to be the main foundation of the American case in the arbitration that followed, related to the construction and equipment in British territory and the treatment in British ports of certain vessels, which had carried on hostilities in the

(*q*) As indeed occurred in the use of French ports by the Baltic Fleet. For a prohibition, on this ground, of an otherwise permissible use of neutral ports, see p. 353, *infra*.

(*r*) See pp. 299, 301, *supra*; H. C., No. 13 of 1907, Art. 5; and H. C., No. 5 of 1907, Art. 3.

(*s*) See vol. i. 62 *et seq.*

cause of the Confederacy and committed extensive depredations on American commerce. With respect to these vessels, Mr. Adams, the United States Minister in London, had on several occasions brought under the notice of the British Government facts tending to show that British neutrality was being abused by the agents of the Confederacy. More particularly, information had been furnished tending to show that vessels already constructed in the United Kingdom were about to be despatched in the service of the Confederacy (*b*); that contracts for the construction of similar warships had been placed there through the agency of a Liverpool firm; and that the latter was arranging a Confederate loan for the purpose of carrying them out (*c*). In some of the cases which were thus brought under its notice the British Government intervened with success (*d*); in other cases it intervened, but met with a rebuff at the hands of the Courts (*e*); whilst in other cases it deemed the evidence insufficient, and either refused to intervene, or failed to intervene in time (*f*). Nor did it see its way, at the time, to amend the municipal law on these subjects, as requested by the United States. In April, 1865, when the war was nearing its close, these and other alleged violations of neutral duty were made the subject of a formal claim for damages on the part of the United States. Thereupon a long correspondence, extending over several years, ensued between the two Governments. The position taken up by the respective parties was in substance as follows: In support of its claims—which came to be known generically as "the Alabama claims"—it was contended by the United States Government

I that the recognition by Great Britain of the Southern Con-

(*b*) As in the case of *The Florida*, in February, 1862; *The Alabama*, in June, 1862; and *The Alexandra*, which was the subject of proceedings in *Att.-Gen.* v. *Sillem* (2 H. & C. 431).

(*c*) This was in February, 1863.

(*d*) As in the case of certain iron-clad rams, built by Messrs. Laird & Co., which were seized and ultimately taken over by the Government. Various prosecutions were also instituted against individuals under the Foreign Enlistment Act, 1819.

(*e*) As in *Att.-Gen.* v. *Sillem* (2 H. & C. 431), where the defendants were charged, under sect. 7 of the Foreign Enlistment Act, 1819, with illegally fitting out *The Alexandra* with a view to her employment against a friendly Power; the defendants being acquitted, on trial, under a direction requiring *a mens hostis* as a condition of liability, whilst an application for a new trial was refused.

(*f*) As in the case of *The Alexandra* herself: see p. 332, *infra*.

federacy had been premature and unwarranted, and had to some extent brought about a state of things which made possible the other illegalities complained of: (2) that the measures taken by the British Government to prevent the sailing from British ports of vessels which had been fitted out and equipped there in violation of its neutrality were tardy and feeble, as well as ineffectual, and that it was immaterial to the United States whether this arose through mistake or defect of law or bad faith or incapacity of officials; (3) that Great Britain did not seize or disarm these vessels on their subsequently coming into British ports, as she was entitled to do; (4) that the British Government had refused even to propose any amendments in the neutrality laws after their inefficiency had been proved; (5) that the British Government had neglected or refused to prosecute the agents of the Confederacy who were residing in England and openly engaged in illegal practices, even though abundant evidence of these had been furnished; and (6) that by reason of these acts the rebel Government had been able to maintain an effective naval force for cruising against American commerce, which had found asylum, effected repairs, and received coal and supplies, in British ports. These occurrences, it was said, had not merely wrought great injury to American commerce, but had largely contributed to the prolongation of the rebellion and the cost of its suppression.

On the part of Great Britain it was contended — (1) that the recognition of belligerency was at once justifiable and necessary (*g*); (2) that the British Government had throughout acted in good faith and with reasonable diligence in enforcing its laws for the preservation of neutrality, and that if subordinate officials failed in diligence or capacity in particular cases, their acts or failures being merely incidental to proceedings in themselves proper and effective, the nation at large could not be held responsible for their remote consequences; (3) that the British Government did in fact seize and prosecute vessels which were charged with having been fitted out in violation of British neutrality, but that it was not bound by the law of nations to seize or refuse shelter to vessels that had been subsequently duly commissioned

(*g*) See vol. i. 62.

as armed vessels of a belligerent Government; (4) that the neutrality laws had not proved so defective as to satisfy the British Government that they needed amendment or as to justify the United States in charging such refusal as a want of good faith; (5) that the British Government had judged in good faith and on the advice of competent counsel whether, in the cases suggested, prosecutions should be instituted; (6) that if vessels fitted out and despatched from British territory, even in violation of British neutrality, had escaped without bad faith on the part of the Government, Great Britain was not responsible for acts of hostility committed by such vessels beyond her jurisdiction, her duty extending only to the restoring of prizes illegally taken which might subsequently be brought within that jurisdiction. On these grounds Great Britain, in the first instance, declined to entertain any claim for compensation.

Other differences of a grave character also existed at the time between the two Powers, including those arising out of the North American Fisheries question (*h*), the navigation of the St. Lawrence and other waters (*i*), the operation of the then British nationality laws in regard to subjects who had been naturalized in the United States (*k*), and the San Juan boundary question (*l*); whilst Great Britain, on her part, had claims against the United States for losses sustained by British subjects during the civil war and by reason of the Fenian raids on Canada. Hence the relations of the two Powers were for some time greatly strained. In 1866, however, on the accession to office of a new administration (*m*), the British Government expressed its willingness to reconsider the question, with the result that a long series of negotiations were entered on with a view to the settlement of both of the "Alabama claims" and other differences. On two occasions — once in 1868 and again in 1869 — a satisfactory agreement appeared to have been reached; but in each case the agreement failed to secure the necessary confirmation on the part of the United States Senate (*n*). In 1871, it was proposed by Great

(*h*) See vol. i. 156.
(*i*) *Ibid.* 116.
(*k*) *Ibid.* 190, 195.
(*l*) Halleck, i. 173, 464.
(*m*) With Lord Derby as Prime Minister and Lord Stanley as Foreign Secretary.
(*n*) In the case of the Johnson-Clarendon Convention of 1869, the Convention was summarily rejected in

Britain that all questions affecting the relations between the United States and the British possessions in North America should be referred to a Joint High Commission, composed of members nominated by the two Governments, which should meet at Washington and treat of or discuss the mode of settling each question. This proposal was accepted by the United States, subject to a condition that the "Alabama claims" should be included in the reference. To this Great Britain assented on condition that the reference should include all claims both of British subjects and United States citizens arising out of the civil war. This, again, was assented to by the United States, with the result that the proposal, as finally amended, was adopted (*o*). A Joint High Commission, consisting of five commissioners nominated by each party, was thereupon appointed, and met at Washington on the 22nd March, 1871. After discussions extending over several weeks, an agreement as to the settlement or mode of settlement to be adopted, in respect of each of the various matters in issue between the two Powers, was ultimately reached. With respect to the "Alabama claims," it was originally proposed that the Commission itself should make an award of damages; but this being objected to by the British delegates on the ground that it assumed a liability which was not admitted in fact, it was ultimately agreed to refer them to a special tribunal, subject, however, to a stipulation, made by the United States and ultimately accepted by Great Britain, that the rules by which the arbitrators were to be guided in their decision should be embodied in the treaty. It was on this basis that the Treaty of Washington, which was signed on the 8th May, 1871, and subsequently duly ratified by both parties, was drawn up. Of the various other matters in issue, all claims against either Government arising out of the civil war, other than the "Alabama claims," were re-

the Senate in circumstances that rendered subsequent negotiations far more difficult than they might otherwise have been: see Moore, Int. Arb. i. 507 *et seq.*

(*o*) This method of settlement, which was reached in the face of unexampled difficulties, was really the outcome of a friendly arrangement previously come to between Sir John Rose, a Canadian Minister, who acted unofficially on behalf of the British Government, and Mr. Hamilton Fish. It is contained in four diplomatic notes, which Mr. Fish described "as the official particulars of twenty months' secret diplomacy": see Moore, Int. Arb. i. 532.

ferred to a Joint Commission (*p*); the Fisheries question was dealt with by the treaty itself (*q*); the question of the navigation of the St. Lawrence and certain other waters was also dealt with by the treaty (*r*); whilst the San Juan boundary question was referred to the arbitration of the German Emperor (*s*). Here, however, we are concerned only with those provisions of the treaty which relate to the "Alabama claims."

The Treaty of Washington and the "Alabama Claims." It was agreed by the treaty that these claims should be referred to a tribunal of arbitration, which was to be composed of five members, nominated respectively by the King of Italy, the President of the Swiss Confederation, the Emperor of Brazil, Great Britain, and the United States. This tribunal was to sit at Geneva; the methods of procedure to be followed being prescribed with some minuteness. The arbitrators in dealing with the matter were required to be guided by the rules embodied in the treaty, in conjunction with such principles of international law, not being inconsistent therewith, as might be found applicable thereto. They were also required to determine, as to each vessel separately, whether Great Britain had failed in her duties; and were empowered, if they thought fit, to award a gross sum by way of damages. The award was to be taken as a final settlement of all claims in dispute (*t*).

The Rules laid down by the Treaty. The rules laid down for the guidance of the arbitrators were as follows:—A neutral Government is bound: (1) To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace, and also to use the like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use. (2) Not to

(*p*) Arts. 12–17 of the Treaty.
(*q*) Arts. 18–25; and vol. i. 156.
(*r*) Arts. 26–29; and vol. i. 118.
(*s*) Arts. 34–42; and Halleck, i. 464.
(*t*) Arts. 1–11.

permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. (3) To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties (*w*). As to these rules, Great Britain declared that, whilst she could not accept them as a correct statement of the principles previously in force, she was, with a view to amicable settlement, willing to accept them as applicable to the subject-matter of the controversy. Both parties further undertook to observe these rules in their future relations with each other, and also to promote their acceptance by other maritime Powers (*x*).

The Constitution of the Court and General Course of Proceedings. A tribunal was thereupon appointed, consisting of Count Sclopis, nominated by the King of Italy; M. Staempfli, by the President of the Swiss Confederation; the Vicomte d'Itajuba, by the Emperor of Brazil; Sir Alexander Cockburn, by the British Government; and Mr. Charles Francis Adams, by the United States Government. The arbitration was held at Geneva, and was opened on the 15th December, 1871; Count Sclopis being elected President. In accordance with the stipulations of the treaty each party presented, in due order, a printed case, a printed counter case, and thereafter a printed argument showing the points and referring to the evidence relied on. On the 19th June, 1872, the Court expressed its opinion on the question of indirect damages, which was accepted by the United States as determinative (*y*). In the exercise of its powers the Court also ordered special argument by the counsel of the respective parties in elucidation of certain points of law, such as the meaning of "due diligence" and the effect of the issue of a commission to an offending vessel; and also on certain issues of fact, such as the alleged recruitment of men by the "Shenandoah" at Melbourne; . On the 23rd of August the Court pro-

(*w*) Art. 6. (*x*) Art. 6; but see p. 340, and n. (*a*), *infra*. (*y*) See p. 332, *infra*. (*z*) See p. 334, *infra*.

ceeded to determine what liability, if any, had been incurred by Great Britain with respect to each of the vessels complained of. On the 2nd September it announced its determination to award a gross sum by way of damages; and on the 14th September it made its final decision and award.

The Cases: (i) *American.*—The American case, after an introductory statement, deals first with the unfriendly course alleged to have been pursued by Great Britain throughout the war, as exemplified in her public action and in the utterances of her public men; the theory underlying this part of the case being that even though isolated acts or the acts of subordinates might not suffice to fix with responsibility a Government that was otherwise honestly endeavouring to discharge its duty, yet a concurrence of such acts, if taken in conjunction with proof of distinct bias, would suffice to establish culpability. It next proceeds to an exposition of the nature of the duties to which Great Britain—as a neutral State and in the actual circumstances of the war—was bound, having regard to the rules laid down by the treaty and the principles of international law consistent therewith. "Due diligence," it was contended, meant a diligence at once proportioned to the dignity and strength of the Power that was called on to exercise it, and also commensurate with the emergency or the magnitude of the results of negligence. As regards the treatment of belligerent vessels in neutral ports, the rules governing the arbitration, whilst not prohibiting the ordinary rights of hospitality, nevertheless prohibited any augmentation or renewal of arms or even of supplies for the purpose of naval operations; they required, in effect, that the vessel must quit the neutral port without having in any way added to her effective power of injuring the other belligerent. As regards the construction of warships in neutral territory, this was not to be regarded as a mere sale of contraband, but as the preparation of an instrumentality of war. Nor could the liability of an offending vessel be got rid of by the subsequent issue to her of a commission by the belligerent Government; at any rate in circumstances such as attended the commissioning of the "Alabama" and other vessels. The case next proceeds to an

examination of the particular matters in which Great Britain had failed in the discharge of her neutral duties. With respect to these, stress was laid on the establishment of Confederate agencies at various times and in various places in British territory for the purchase of arms and ammunition, the fitting out of vessels, and the financing of the rebellion; all of which, it was alleged, pointed to the establishment by the Confederacy, on British soil, of a military department, a naval department, and a treasury. It was further alleged that, at the port of Nassau, special facilities had been granted to Confederate agents and denied to the United States (*a*); and also that excessive hospitality had been rendered to Confederate vessels in British ports, in the matter of coal and duration of stay. These alleged violations of neutral duty were then traced in the history of the careers of the particular cruisers whose acts were complained of. Finally, the case deals with the question of damages; claiming under this head an indemnity, not only for direct losses arising from the destruction of vessels and their cargoes, but also for the cost of pursuit, the losses sustained by the transfer of American shipping to the British flag, the enhanced rates of insurance, the prolongation of the war, and the increased cost of quelling the rebellion.

(ii) *British.*—The British case, after referring to the scope of the arbitration as understood by Great Britain (*b*), proceeds to a vindication of the action of the British Government by reference both to the orders issued and the measures actually adopted to secure the observance of its neutrality. The orders issued had, in fact, been more stringent and comprehensive than those issued by any other Power; the measures for the repression of unneutral practices had been vigilant and constant, and such as to provoke complaint on the part of the other belligerent. In these endeavours the Government had in some cases overstepped its international obligations; and had also been treated by the Courts as having exceeded its legitimate powers (*c*). With

(*a*) The United States Government appears to have desired to establish a coal depôt at this place; which, as a flagrant breach of neutrality, was necessarily objected to by Great Britain: See Moore, Int. Arbs. i. 582.

(*b*) Seeking, in fact, to confine it to vessels whose acts had been the subject of previous diplomatic complaint.

(*c*) See *Att.-Gen.* v. *Sillem*, *supra*, p. 321, n. (*c*).

respect to the use made of British ports for coaling and other purposes, it was shown that a far more extensive use of these ports had been made by United States cruisers than by those of the Confederacy (*d*). Dealing with the rules of law and the international rights and duties applicable to the situation, it was pointed out that a neutral Power was not bound to prohibit the sale or export of articles of contraband, or to prohibit supplies or repairs to belligerent vessels, so long as equal facilities were afforded to each belligerent and there was no augmentation of military force. It had also hitherto been the practice to treat vessels specially constructed or adapted to warlike use in neutral territory and found under the neutral flag, as being on the footing of contraband. Moreover, if once a vessel was duly armed and commissioned by a recognized belligerent she acquired the status of a public ship of war, and was as such exempt from the ordinary law and ordinary process. To withdraw such exemption, or to assume jurisdiction over such a vessel without previous notice, would be to violate a common understanding which all nations were bound in good faith to respect. Turning to the question of "due diligence," it was pointed out that this meant "the measure of care which any Government was under an international obligation to use for a given purpose": and that no distinction could be drawn between one Power and another as regards dignity or ability (*e*). In a case, such as that under consideration, where the measure of diligence could not be precisely defined, a rough measure might be found in the diligence which a State would employ in matters affecting its own interests, although in practice a lower standard had been virtually accepted. Moreover, although the duty of neutrality existed independently of municipal law, yet in determining whether due diligence had been exercised by a particular Government some regard should be had to its powers under its municipal law, so long as these were not glaringly deficient. Nor, so long as the municipal law of a neutral country was reasonably adequate and carried into effect, could a belligerent require the neutral Government to overstep that law in a particular case in order to prevent some harm being

(*d*) For details, see p. 331, *infra*. (*e*) *Supra*, p. 327.

done. With respect to blockade running and contraband trade, British subjects had been warned of their risks; beyond this the Government had no power to go; the enforcement of its rights in this respect devolving on the belligerent. In every case to which its attention had been directed the Government had acted on the complaint to the full extent of its legal powers. In other cases it had gone out of its way to avoid anything that might be likely to compromise its neutrality (*f*). The British case then proceeds to a detailed examination of the facts with respect to particular cruisers whose acts were complained of (*g*). In conclusion, it was denied that there were any grounds upon which to found a claim for indemnity. To establish such a claim, it was not enough to show that a Government had acted on an opinion or a judgment which the tribunal itself might deem questionable, or that there had been defect of judgment or penetration, or some delay or lack of the utmost possible promptitude; but it must be shown that there had been a failure to use such care as Governments ordinarily employ in their own domestic concerns, and may reasonably be expected to exert in matters of international obligation. In any case, moreover, there had been, on the part of the United States, an extraordinary remissness in the attempts to capture the vessels whose acts were complained of, which had greatly contributed to the results complained of.

The Counter-Cases: (i *American*.—The American counter-case is very brief and adds but little in the way of argument. It criticizes, however, the British exposition of "due diligence" as setting up a standard which would "fluctuate" with each succeeding Government in the circuit of the globe; whilst it challenges the statement that the British neutrality law was more stringent than that of the United States, by a comparison of sections.

(ii *British*. The British counter-case questions the various propositions on the subject of neutral duty advanced by the United States; and, in particular, asserts that the alleged duty of neutral

(*f*) As in the case of the Anglo-Chinese flotilla: Moore, Int. Arb. i. 608.

(*g*) *Infra*, p. 332 *et seq.*

States to prevent their subjects from supplying belligerents with ships adapted to warlike use was not evidenced either by any text book of acknowledged authority anterior to the civil war, or by the general practice of nations. A contrast is drawn between the standard of neutral duty sought to be enforced by the United States against Great Britain, and that actually observed by the United States Government itself in its relations with other States (*h*). With respect to the suggestion that the Confederacy, in its employment of agents on British territory for the purchase of arms and ammunition of war and for the paying of monies therefor, had virtually been allowed to establish there "a branch of its war department and treasury," it was pointed out that the same might be said of the United States, which at the commencement of the war had made large purchases of arms and military material both in Great Britain and other European countries and had paid for the same through their financial agents in England. The British Government had no power to prohibit the raising of a loan such as that contemplated by the Confederacy, any more than it could prohibit subscriptions on the part of its subjects to the war loans issued by the United States. As to the alleged excessive hospitality extended to the Confederates in British ports, the official returns showed that during the course of the war only ten Confederate vessels had visited British ports, the total number of visits being twenty-five; that repairs had only been effected on eleven, and coal taken on sixteen occasions; and that the regulation limit for stay had been exceeded only on sixteen occasions. As against this, the total number of visits on the part of United States vessels had been 228; repairs had been effected on thirteen, and coal taken on forty-five occasions; whilst the limit of stay had been exceeded on forty-four occasions. In the matter of coal a single United States vessel had within six weeks obtained from three British ports more than two-thirds of the total amount obtained by the Confederates during the whole war. With respect to the alleged exclusion of United States vessels from Nassau in favour of the

(*h*) Reference is made in particular to the expeditions against Cuba and Mexico, and the Fenian raids on Canada.

Confederates, the United States vessels had paid thirty-four visits to Nassau, and the Confederate vessels only two.

The Indirect Claims. After the presentation of the American case a serious controversy arose over the jurisdiction of the Court to deal with the indirect claims; these being claims for losses alleged to have been sustained by the transfer of American shipping, the enhanced rates of assurance, and the prolongation of the whole war. Such claims were declared by the British Government to be wholly inadmissible and outside the scope of the arbitration as contemplated by it. At one time it seemed likely that the arbitration would break down on this question; but ultimately an agreement was reached, under which these claims were technically submitted, although in effect only for the purpose of rejection. On the 19th June the Court accordingly expressed an opinion that the indirect claims did not "constitute, upon the principles of international law applicable to such cases, a good foundation for an award of compensation or computation of damages between nations . . . even if there were no disagreement between the two Governments as to the competency of the tribunal to decide thereon." This was accepted by the United States as determinative of the arbitrator's judgment upon the question, and these claims were accordingly withdrawn.

Facts and Causes of Complaint with respect to particular Vessels: (i *The "Alabama" and her Tender.* This vessel was built at Liverpool and launched in May, 1862. She was known as No. 290, but was evidently intended as a vessel of war. On the 23rd June the United States Minister advised the British Government that the vessel was about to leave with the view of entering the service of the Confederacy: but it was not until the 16th July that the law officers of the Crown advised that there was sufficient evidence to warrant her detention: nor was her detention actually directed until the 31st July. Meanwhile, on the 29th, the vessel herself had sailed, though unarmed, from Liverpool. She proceeded to the Azores, where she was equipped as a vessel of war: her armament, together with a number of recruits, having been brought out to her by two vessels that had also

cleared from British ports. She was then commissioned as a Confederate warship, and thereafter committed a variety of depredations on American commerce, besides destroying the United States warship "Hatteras." From time to time she put into British ports and was allowed to take coal and to effect repairs; a request for her seizure, as having been fitted out in violation of British neutrality, being refused on the ground that she was protected by her commission as a public armed vessel of a recognized belligerent. On the 19th June, 1864, she was sunk, after an encounter which took place off Cherbourg, by the United States warship "Kearsage." The main grounds of complaint with respect to this vessel were: (1) that she had been constructed and fitted out and equipped within the jurisdiction of Great Britain, with intent to cruise against the United States, Great Britain having reasonable ground to believe in such intent, and having failed to use due diligence to prevent its being carried out; (2) that inasmuch as both the vessel and her armament were constructed within British territory and both subsequently despatched from a British port, the British authorities having ample notice of these facts, the whole must be regarded as a hostile expedition fitted out in British territory against the United States; (3) that, in the circumstances of the case, Great Britain was bound to use, but had in fact failed to use, due diligence to prevent her departure from Liverpool or from other British ports which she subsequently visited. It was also contended that the responsibility for the vessel herself carried responsibility for the acts of her tender, the "Tuscaloosa" (*i*).

(ii.) *The "Florida" and her Tenders.*—This vessel was also built at Liverpool, and was originally known as the "Oreto." She was then represented as being intended for the Italian Government, but was on the 3rd March, 1862, registered in the name of a private owner. She sailed from Liverpool on the 22nd March with a clearance for Palermo and Jamaica, being at the time unarmed, although her fittings and arrangements were suitable to a ship of war. She then proceeded to Nassau, in the Bahamas, where she was arrested and proceeded against under

(*i*) *Ante*, p. 338.

the Foreign Enlistment Act, but ultimately released on the ground, amongst others, that there was no evidence of her having been transferred to a belligerent. According to the American case, she was then taken charge of by a Confederate officer and proceeded to Green Cay, in the Bahamas, where she was equipped as a vessel of war, under the name of the "Florida"; her armament, munitions of war and supplies having been brought to her by another British vessel that had also cleared from Nassau. Subsequently she proceeded to Mobile, a Confederate port, and issued therefrom as a Confederate cruiser; committing thereafter extensive depredations on American commerce, and being admitted to British ports on the footing of a public vessel. In October, 1864, she was seized in Brazilian waters by a United States warship, but subsequently lost by collision [*k*]. The grounds of complaint in the case of this vessel were: (1) that she was fitted out and equipped within British jurisdiction, and left Liverpool with the intent to cruise against the United States; (2) that she had been specially adapted to warlike uses within British territory; (3) that Great Britain had reasonable ground for believing in such facts and intent; and (4) that Great Britain had failed both to prevent her original departure and to seize her on her re-entry into British ports. It was also contended that the responsibility for the acts of the "Florida" carried responsibility for the acts of three vessels, the "Clarence," the "Tacony," and the "Archer," which had been fitted out and manned, and used by her as tenders, and which had also made captures of American vessels.

(iii) *The "Shenandoah."*—This vessel was originally a British merchantman known as the "Sea King." During the civil war she was purchased by the Confederate authorities, and in October, 1864, left Liverpool, nominally for Bombay. In fact she proceeded to Funchal, in Madeira, where she was transformed into a Confederate cruiser under the name of the "Shenandoah"; her arms and munitions of war having been brought out to her by a vessel that had also cleared from a British port; whilst some members of her original crew were persuaded to enlist. She sub-

[*k*] *Supra*, p. 291.

sequently proceeded to Melbourne, capturing several prizes on the way. On the occasion of her putting into Melbourne, on the 25th January, 1865, the United States Consul brought the facts under the notice of the authorities, and protested against her reception. She was nevertheless received as a public vessel, and allowed to effect repairs, and to take supplies and coal. She was also said to have enlisted recruits there (*l*). As regards this vessel the grounds of complaint were: (1) that she had been fitted out and armed in British territory with intent to carry on war against the United States, Great Britain having reasonable ground to believe this, and having failed to use due diligence to prevent it; (2) that on coming again within British jurisdiction she was not seized but was allowed to depart; (3) that she received recruits on British territory without due diligence being used to prevent this; and (4) that, in being allowed to effect repairs and take in coal and supplies (*ll*), she was in fact permitted to make British territory a "base of operations."

(iv) *The "Georgia."*—The "Georgia" was a British built ship, originally known as the "Japan," but was acquired by the Confederacy, and subsequently equipped with arms and ammunition brought from British territory. She proved, however, wholly unsuited for purposes of war, and was subsequently dismantled, and sold whilst in a British port to a private purchaser. She was afterwards captured by a United States warship, and was subsequently condemned on the ground that she had been a Confederate cruiser and was therefore incapable of transfer during the war (*m*). As regards this vessel, the main grounds of complaint were: (1) that she had been illegally constructed in British territory with intent to cruise against the United States; (2) that she had through lack of due diligence been allowed to depart therefrom; and (3) that she had been afterwards received in British ports.

But, according to the British case, open enlistment only occurred in the case of four persons, all of whom were proceeded against; a written declaration was also taken from the captain that no additions had been made to his crew; whilst, on the discovery that certain persons had afterwards been secretly put on board at night, the vessel was refused further access to British ports.

This refers to the supplies received at Melbourne.

See *The Georgia*, 7 Wall. 32; and p. 147, *ante*.

(v *Other Vessels.*—Claims were also made in respect of the "Nashville," the "Sumter," the "Retribution," the "Tallahassee," and the "Chickamauga"; as well as in respect of five other vessels. But as to the former group of cases the Court found that there had been no breach of duty on the part of Great Britain: whilst as to the latter it found that there was not sufficient evidence even to warrant their consideration.

The Decision and Award: (i *Basis.* The award, after pointing out that the decision arrived at had been based on the rules laid down by the Treaty of Washington together with such principles of international law not inconsistent therewith as had been found to be applicable by the arbitrators, proceeds to lay down several important principles of interpretation with respect to the rules embodied in the treaty.

(ii) *Rules of Interpretation.*—These were in effect as follows: (1) That the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral Governments in proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part. (2) That the circumstances out of which the facts constituting the subject-matter of the controversy arose were of a nature to call for the exercise on the part of the British Government of all possible solicitude for the observance of the rights and duties involved in the British proclamation of neutrality on the 13th May, 1861. (3) That the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent benefited by the violation of neutrality may afterwards have granted to that vessel, for the reason that the ultimate step by which an offence is completed cannot be admitted as a ground for the absolution of the offender, and that a consummation of his fraud cannot be used by him as a means of establishing his innocence. (4) That the privilege of exterritoriality accorded to warships had been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between nations, and therefore can never be appealed to for th

protection of acts done in violation of neutrality. (5) That the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations in those cases in which a vessel carries with it its own condemnation (*n*). (6) That in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such a character.

(iii) *Decisions with respect to particular Cruisers.* (1) With respect to the "Alabama," four of the arbitrators held that Great Britain had failed to fulfil the duties prescribed by the first and third rules of the treaty; for the reason (a) that notwithstanding the official warnings and representations of the United States Great Britain had omitted to take effective measures of prevention; (b) that when orders for the detention of the vessel were issued they were issued too late; (c) that the measures taken for the pursuit and arrest of the vessel were imperfect and ineffective; (d) that the vessel was on several occasions subsequently admitted freely into British colonial ports instead of being proceeded against; and (e) that such a failure in due diligence found no justification in the plea of inadequate legal powers. The fifth arbitrator, Sir Alexander Cockburn, agreed in the result, but attributed the breach of duty to an unfortunate and unforeseen accident (*o*).

(2) With respect to the "Florida," four of the arbitrators held that Great Britain had failed to fulfil the duties prescribed by the same rules; for the reason (a) that notwithstanding the representations of the United States adequate measures were not taken to prevent her construction and original departure from Liverpool; (b) that there had been a failure of diligence on the part of the colonial authorities as regards her stay at Nassau, her issue from that port, her enlistment of men, her supplies, and her armament at Green Cay; (c) that she was on several occa-

(*n*) This refers to the British argument: see p. 329, *supra*.

(*o*) Moore, Int. Arb. iv. 4159.

sions subsequently admitted to British colonial ports; and (d) that her acquittal at Nassau did not relieve Great Britain of international responsibility, or her stay at Mobile affect any prior responsibility that had been incurred.

(3) With respect to the "Shenandoah," the arbitrators unanimously held that Great Britain had not failed in her duty under the rules prior to that vessel's entry into the port of Melbourne; but held, by a majority, that there had been a failure of duty under the second and third rules of the treaty, as regards the refitment and supplies obtained at that port (*p*).

(4) With respect to the "Tuscaloosa" (*q*), the "Clarence," the "Tacony," and the "Archer" (*r*), the arbitrators unanimously held that as tenders they were governed by the decisions arrived at with respect to the vessels to which they acted as auxiliaries.

(5) With respect to the "Retribution," three of the arbitrators—and with respect to the "Georgia," "Sumter," "Nashville," "Tallahassee," and "Chickamauga," all the arbitrators—held that there had been no default.

(6) With respect to the other cases it was held unanimously that they should be excluded from consideration for want of evidence.

iv. *The Question of Damages.* With respect to the question of damages, it was held by three arbitrators that damages in respect of the cost of the pursuit of the Confederate cruisers could not be awarded, inasmuch as such costs were undistinguishable from the general expenses of the war. It was held by all the arbitrators that damages in respect of the prospective earnings of the vessels destroyed could not properly be made the subject of compensation, for the reason that such earnings were dependent on future and uncertain contingencies. It was also decided that interest should be allowed and that it was preferable to award a gross sum by way of compensation rather than to refer the matter for subsequent assessment. On this basis four of the arbitrators

(*p*) Count Sclopis found, as a fact, that a large number of men had been enlisted, and, as a matter of law, that the large supplies of coal amounted to a preparation for a hostile expedition: Moore, Int. Arb. iv. 4177; but see p. 342, *supra*.

(*q*) *Supra*, p. 333.

(*r*) *Supra*, p. 334.

awarded to the United States a sum of $15,500,000 in gold, to be paid by Great Britain in full and final satisfaction of all claims referred to in the treaty. The amount so awarded was duly paid over by the British Government to that of the United States in September, 1873 (*s*).

This arbitration was in many respects unsatisfactory. The tribunal itself was not well constituted: two of the foreign arbitrators being wholly unfamiliar with English, and the British and American representatives being really advocates, whilst some of the arbitrators, at any rate, appear to have had an imperfect conception of their duties. The course of procedure followed was not strictly judicial, inasmuch as in some cases the questions at issue appear to have been considered before, instead of after, the argument of counsel. Finally, both the rules of the Treaty of Washington which governed the arbitration, and the rules of interpretation adopted by the tribunal, are loosely expressed, and on some points, indeed, scarcely intelligible. Notwithstanding these defects the arbitration may be said—both from the gravity of the issues involved, the dignity of the Powers that were parties to it, and above all, its far-reaching influence as a national example—to constitute a distinct epoch in the history of international organization. Nor does it possess merely an historic interest, for the rules of the treaty on which it was based have, as we shall see, now been adopted (*t*) as a part of the conventional law of nations (*u*); whilst both the cases presented by the parties and the rulings of the Court touch on a great diversity of questions that still retain their importance.

With respect to the correctness of the decision, it seems unquestionable that, under the rules accepted by Great Britain as governing the arbitration, some indemnity was due to the United States; although the amount of direct damage sustained by the latter appears to have been greatly over-estimated, whilst the claims for indirect damages were wholly unwarrantable.

In the occurrences which gave rise to the dispute, the British Government was probably actuated throughout by an honest desire to maintain its neutrality according to existing standards (*x*). But

(*s*) This was effected by a purchase of redeemable bonds, forming part of the United States debt. For this a coin certificate was issued by the United States Treasury to the bankers who acted for the British Government. This certificate was endorsed to the order of certain British officials, and was then endorsed by the latter to the order of the United States Secretary of State, and by the latter to the Secretary of the Treasury.

(*t*) Although with some modification of their terms.

(*u*) See H. C., No. 13 of 1907, Arts. 5, 6, 8; and p. 344, *infra*.

(*x*) On some occasions, indeed, the United States expressed a high appreciation of the measures adopted; and a similar conclusion is suggested by the testimony of Mr. Adams, the United States Minister in London: see Moore, Int. Arb. i. 662.

it was hampered in its action by the lack of legal powers adequate to occasions that were then novel in their character; it was often ill served by its local agents, acting sometimes at a great distance, and under the influence of a popular feeling in favour of the Confederacy, which was itself largely attributable to the unfriendly and aggressive policy previously pursued by the United States towards Great Britain; whilst its own action was often characteristically dilatory and slipshod. In accepting the rules prescribed by the Treaty of Washington, moreover, Great Britain submitted to be tried by a new standard, which, although not unjust in itself and now generally accepted, yet represented a distinct advance on neutral responsibility as previously understood. Indeed, the United States Government itself appears subsequently to have admitted that it apprehended serious risk if it were required, in a maritime war in which the United States were neutral, to observe the same rules of neutral duty as those which it sought to enforce against Great Britain (*y*). It is also significant to notice that that Government afterwards proposed to treat these same rules as being merely temporary rules adopted for the guidance of a special Court, and as not binding, even on the parties themselves, in future cases (*z*). The case for the United States, as presented to the Court, was conceived in the bitterest spirit (*a*), and also comprised many charges that must have been based on imperfect information or wantonly exaggerated (*b*); a fact which appears to be often ignored even by British writers.

The principal issues of law involved in the arbitration were shortly these:—(1) On the question of "due diligence," the United States contended in effect that this was to be measured by the ability of the party that was to exercise it, the exigencies of the case, and the magnitude of the results of negligence. The British view was that, except where more precisely defined by usage or agreement, it must be measured by the amount of care usually employed by a civilized Government in matters affecting its own security or that of its citizens. The Court, in its interpretation of rules (1) and (3), held that it meant a diligence "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality" (*c*). This probably means no more than that diligence, in order to rank as "due," must increase in proportion to the apparent risks; a principle which is not in itself unreasonable, so long as it is limited to risks that are apparent at the time when the performance of the duty is in question. But

(*y*) See Wharton, Dig. iii. 651.

(*z*) This on the pretext that they had not been submitted for acceptance to other maritime Powers. Such, at any rate, appears to be the position taken up by Mr. Fish in his letters to Sir E. Thornton of the 8th May and 18th September, 1876, as communicated by President Hayes in his message to the Senate of the 13th January, 1879: see Wharton, Dig. iii. 649; and Moore, Int. Arb. 670.

(*a*) It was spoken of by the British representative as aiming "to pour forth the pent-up venom of national and personal hate."

(*b*) See, by way of illustration, p. 336, *supra*.

(*c*) A summary of the various comments passed on this subject by writers of authority will be found in Moore, Int. Arb. i. 671.

even so, it touches only on one aspect of the subject, and still leaves open the question of the measure of the diligence in other respects. It is, however, impossible, whether in international or in municipal law, to define with any exactitude the measure of diligence required in varying circumstances and conditions. In municipal law, judicial decisions and supplementary rules often serve to mark more clearly the measure of diligence required in particular cases; but, outside these cases, the vague standard of "reasonable" care or diligence still obtains; and has to be applied in practice by reference to existing conditions and prevalent standards of conduct. Much more is this so in international law, where these supplemental agencies have only recently come into operation. Here, then, "due diligence" must be taken to mean that degree of vigilance and care which may be expected from a well-ordered State which is at once alive to its responsibilities and wishful to fulfil them, and the Government of which is endowed with powers adequate to their discharge in circumstances reasonably likely to occur. And if the question should arise before an international tribunal, that tribunal would, it seems, be equally bound to apply this abstract rule in the light of current standards and prevalent conditions (*d*). So far as relates to neutral duties of the kind we are here concerned with, these, as we shall see, are now declared by the Hague Convention; whilst, in the performance of them, the neutral State is required only to apply such vigilance as the means at its disposal permit (*e*). This has the effect of modifying (although seemingly only as regards a particular class of States (*f*)) the customary rule that would otherwise apply. But, subject to this modification, the question of what constitutes due diligence in the discharge by a State of its international obligations may still arise, and must then, it is conceived, be determined in accordance with the principles indicated above. (2) With respect to the bearing of municipal law on international obligations, it was contended by the United States that the duty of a neutral State was to be measured by the rules of international and not of municipal law (*g*). Great Britain, whilst admitting this generally, yet contended that in estimating the action of a Government, some regard should be had to the measure of its powers under the municipal law so long as these were not glaringly deficient. In the result the Court ruled that the insufficiency of legal powers afforded no justification for failure to exercise due diligence. And this ruling is certainly correct, in so far as it asserts that defects of local law cannot

[illegible] was probably an appreciation [illegible] See H. C., No. 43 of 1907, [illegible] Art. 25; and n. 341, [illegible] [illegible] 345; although even here [illegible] question may arise as to what [illegible] constitutes "disposal" [illegible] by a State in [illegible] "disposal." [illegible] breach of treaty against the [illegible] 389.

in general be accepted as an excuse for or even in extenuation of the non-fulfilment of international duties (*h*). At the same time, the duty in such cases is not an absolute duty of prevention, but merely a duty to use due diligence to prevent a violation of neutrality, and will be discharged if powers sufficient to meet cases ordinarily likely to occur in practice are both given and made use of (*i*). (3) With respect to the effect of the issue of a commission to a vessel which had been constructed and fitted out in violation of neutrality, the United States contended that this fact did not, at any rate in the circumstances that there existed, protect her on subsequently coming within the neutral jurisdiction. As against this, Great Britain contended that the acknowledged exemption from the local jurisdiction of a vessel bearing the commission of a recognized belligerent could not be withdrawn—at any rate, without previous notice. The Court finally held that the effects of such a violation of neutrality were not done away with by the issue of a commission by the offending belligerent; although this ruling cannot, as we shall see, be regarded as a correct statement of the law (*k*). (4) With respect to supplies of fuel, it was contended by the United States that an undue supply of coal to a belligerent might afford evidence of the use of neutral territory as a base of operations. As against this, it was contended by Great Britain that the use of neutral territory as a base of operations meant a continuous use, or a use both as a point of departure and return. The Court does not appear to have held Great Britain responsible for the acts of any vessel by reason merely of supplies of coal. But in the case of the *Shenandoah* it held that the occurrences at Melbourne, on one occasion only, amounted to a use of that port as a base for the preparation of a hostile expedition (*l*); whilst it also lays down the general rule, that supplies of coal, in order to constitute a violation of rule (2) of the Treaty, must be connected with special circumstances of time, persons, or place, which may combine to give them that character. The question of the supply both of provisions and coal, and the question of repairs, are, however, now regulated by the Hague Convention (*m*); whilst the question of the conditions under which undue supplies will support a charge of the use of neutral territory as a base of operations has already been considered (*n*). (5) On the question of damages the Court, as we have seen, pronounced against the indirect claims; it further disallowed the claims for the costs of pursuit of the cruisers whose acts were complained of; thus leaving only the claim for direct losses arising out of the destruction of the vessels and their cargoes as the subject of award. The Court also refused to admit prospective earnings (*o*) as a proper

(*h*) See vol. i. 222.
(*i*) *Supra*, p. 341.
(*k*) *Infra*, p. 347.
(*l*) The award refers only to rules 1 and 2, but this was in addition expressed by the President. *Supra*, p. 338, [illegible].
(*m*) *Infra*, p. 362.
(*n*) *Supra*, pp. 319, 320.
(*o*) Or "gross" as distinct from "net" freights.

basis for computation of losses; and disallowed double claims, as by owner and insurer: but allowed interest as an element in the award of a sum in gross.

General Notes. *The Construction or Fitting Out of Vessels of War in Neutral Territory:* (i) *The Earlier Law.*—Although under the earlier law a neutral State might not itself supply ships of war to a belligerent (*p*), it was under no obligation to prevent its subjects from doing so; and at a time when privateering still prevailed, and when the line between ships adapted and not adapted for war was not so clearly drawn as now, the sale of such vessels by neutrals to belligerents was of common occurrence. If, in such a case, the neutral seller engaged to deliver the vessel outside neutral territory, he took the risk of its capture and condemnation as contraband of war. If, on the other hand, it was transferred to a belligerent agent in neutral territory, the purchaser took the risk of its capture as enemy property. Subject to these risks it was equally open to the neutral either to sell a vessel already built, or to agree to build a vessel for the purchaser, and this without in either case involving his State. But if a ship adapted for war was not merely constructed and sold in neutral territory, but was there furnished with a commission and also with a crew and armament sufficient to enable her to engage in hostilities on quitting neutral territory, then the territorial Power became involved, for the reason that such a proceeding was accounted as the preparation in neutral territory of an instrumentality of war, which it was bound to prevent. And this rule may be said to have obtained as between States that had not otherwise bound themselves until the latter part of the 19th century (*q*), or, as some think, until the Hague Convention of 1907 (*r*).

(ii) *The Formation of a New Usage.* Meanwhile a new usage—the effect of which was to require the neutral State to prohibit the construction or outfit in and the despatch from its territory of vessels of war intended for the service of either belligerent—emerged and developed, and finally took shape as law. This usage appears to have had its origin in the municipal ordinances of some of the smaller Italian States, which, during the latter part of the 18th century, made it a penal offence to sell, build, or arm, within their territories, vessels of war for either belligerent (*s*). This example was subsequently followed also by other States, such as the United States in 1793, and Austria in 1803. Similar rules, although in a more developed form, were embodied in the United States neutrality legislation of 1794 and 1818 (*t*), and in the British Foreign Enlistment Act of 1819; and became, at any rate in the former

(*p*) *Supra*, p. 304.
(*q*) *Infra*, p. 344.
(*r*) See Hall, 610; and p. 344.
(*s*) Hall, 607.
(*t*) *Infra*, p. 377.

country, the subject of an extensive judicial interpretation (*q*). This fact, added to the manifest need of some such rule in the conditions of modern maritime war a need greatly emphasized by the events of the American civil war—subsequently led other maritime Powers, such as France, Denmark and Holland, to amend their municipal laws in the same direction, by forbidding the equipment or armament within their territories of vessels of war intended for the service of either belligerent (*r*). In the *Alabama* controversy this incipient custom was accepted by Great Britain as being internationally obligatory, at any rate as regards the matter in dispute (*s*); whilst, as the result of the Geneva arbitration, the rules on this subject, as formulated by the treaty and as interpreted and applied by the tribunal, became the subject of a widespread juristic discussion. In 1875 a rule to the effect that a neutral State is bound to see that other persons do not within its ports or waters put vessels of war at the disposition of the belligerents, was adopted also by the Institute of International Law. In 1898, during the Spanish-American war the new usage was recognized and acted on both by the British and other Governments (*t*). In this way the usage in question may probably be said, at any rate before the close of the 19th century, to have ripened into an obligatory custom (*a*).

(iii) *The Existing Law.* Neutral responsibility in such cases is now regulated by the Hague Convention, No. 13 of 1907. The rules embodied in this Convention, although binding strictly only on the signatories (*b*), will probably set the standard of international duty in this matter for the future, although still requiring at some points to be supplemented by reference to the customary law. The Convention declares that a neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise or engage in hostile operations against a Power with which it is at peace; and is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations which has been adapted in whole or in part, within the said jurisdiction, to warlike use (*c*). This, it will be seen, reproduces the first rule of the Treaty of Washington, with the substitution of the expression "is bound to employ the means at its disposal" for "is bound to use due diligence." This has the [illegible]

(*a*) [illegible] will be found [illegible] Wharton, Digest, ii. 215, [illegible]

(*b*) [illegible] Britain, [illegible]

(*c*) [illegible] by the United States through [illegible] Geneva, [illegible] British Counter-Case, Moore, Digest, vii. 948. See Hall, Int. L. 6th ed. 1909, p. 695.

(*t*) See Appendix [illegible]

-st making the responsibility of the neutral Government contingent on ability. But the ability referred to is, it is conceived, only an ability as regards material means, and would not therefore cover a failure arising out of the non-bestowal of adequate legal powers; the restrictive words being designed mainly in the interest of minor Powers not possessing adequate means of repression as against a powerful belligerent. For the rest, the actual measure of vigilance required to be shown by a State in the employment of the means at its disposal is still left undefined, and must continue to be ascertained according to the principles and methods previously applicable (*d*). And this obligation, whatever its scope, will arise whenever a neutral Government has reasonable ground for "believing" that a vessel so fitted out or armed is "intended" to cruise or engage in hostile operations against the other belligerent. The "belief" must be on the part of the neutral Government; whilst the "intention" must be on the part of those who have control of the vessel within the neutral territory. To constitute such an intention, however, there must be an expectation, arising out of present circumstances and dealings, that the vessel is to be so employed; and not a mere surmise that she may eventually be so employed as the result of further dealings or transactions (*e*). Such an intention may, as we shall see, often be deduced from the character and structure of the vessel, although this is far from being conclusive in all cases (*f*).

Presumptions attaching to different Classes of Vessels. The rule contemplates, apparently, only vessels capable of being used for "fighting" or "cruising." In applying it, however, we need—especially in relation to the question of proof of "intent" or "belief"—to distinguish three classes of vessels. First, there are fighting ships proper, in the nature of battleships, cruisers, destroyers, torpedo boats, or submarines. Inasmuch as vessels of this character are easily distinguishable by their special design, the construction of any such vessel in neutral territory, and in time of war, to the order of an individual, or otherwise than to the genuine order of a neutral State (*g*), would afford a presumption of intent, of which the territorial Power would be bound to take cognizance. Nor would the fact of a vessel of this description, but of the smaller type, having been constructed in sections and afterwards sent from neutral territory [illegible] belligerent destination on board some larger vessel appear to relieve a neutral State from its responsibility: for the neutral Government is bound to prevent the fitting out as well as the despatch of vessels of this kind, whilst the fact of such a vessel being under

[illegible] vessel," and not the "intent," should be the controlling factor in [illegible] cases. [illegible] being the duty of the neutral Power to attempt [illegible] the [illegible]

construction is, in general, easy of ascertainment. In 1904, however, when two submarines, the *Protector* and the *Fulton*, were despatched from the United States to Russia, the United States Government, on ascertaining the fact, declined to interfere, claiming to treat this as being merely an export of contraband. During the same war, also, the German Government permitted the exportation overland to Russia of the requisite parts of a number of torpedo boats or destroyers, which were afterwards fitted and put together at Libau (*h*). But all such cases would, it is conceived, now come within the terms of Art. 8 of the Hague Convention, No. 13 of 1907. (2) Next there are vessels of a purely commercial type, which are from their character and build wholly unsuited for either of the purposes indicated above, even though they might be used as colliers or supply ships. As to these no presumption whether of "intent" or "belief" will arise. (3) Finally there is an intermediate class, comprising many gradations, but consisting in general of vessels which, although primarily mercantile in their character, may nevertheless from their size and speed be easily adapted for use in war as cruisers. During both the Spanish-American war of 1898, and the Russo-Japanese war of 1904-5, a number of vessels of this type were sold by German companies to belligerent purchasers (*i*). As to vessels of this type—and omitting the question of the sale of subsidized vessels which has already been discussed (*k*)—it would seem that a sale to a private purchaser carries no presumption of intent to employ the vessel in hostile operations, and that in such a case therefore the territorial Power is not bound to intervene, unless there is some further or more direct proof. But an adaptation of a vessel, whether of this or any other type, to warlike uses, within neutral territory and whilst a war was being waged, would, it is conceived, create such a presumption, and would therefore impose on the territorial Power a duty of vigilance in the matter of enquiry and prevention.

The Augmentation of Force of Belligerent Warships. The second rule of the Treaty of Washington imposes on a neutral Government the duty of not permitting either belligerent to use neutral ports or waters as a base of naval operations, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. The prohibition against using neutral ports or waters as a base of operations is, as we have seen, reproduced by Art. 5 of the Hague Convention, No. 13 of 1907, and although this is only in the form of a prohibition addressed to the belligerent, yet by Art. 25 the neutral State is put under a similar obligation to prevent its evasion (*l*). With respect to augmentation of force, Art. 18 provides that belligerent warships may not make use of neutral ports, roadsteads, and territorial waters for replenishing

(*h*) See Hershey, 90.
(*i*) See Takahashi, 188.
(*k*) [illegible] p. 305.
(*l*) That is, by the exercise of such vigilance as the means at its disposal permit: Art. 25.

or increasing their supplies of war material, or their armament, or for completing their crews; the object being to ensure that a belligerent vessel shall leave neutral territory without having in any way added to her fighting force or effective power of injury (*m*). Under the earlier law it appears to have been regarded as permissible for a belligerent vessel to ship, even in a neutral port, such a number of men as might be necessary to the navigation of the vessel to her own country; but this, despite the analogy of repairs, would not be admissible under the existing rule (*n*).

The Duty of Neutrals as regards the Enforcement of these Restrictions. By the third rule of the Treaty of Washington it is declared that a neutral Government is bound to exercise due diligence in its ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the obligations previously recited. This rule is, as we have seen, reproduced by Art. 25 of the Convention, which provides that a neutral Power must exercise such vigilance as the means at its disposal permit to prevent any violation of the duties previously described occurring in its ports, roadstead, or waters. In this way the Convention virtually adopts, as a part of the written law of nations, all the rules previously embodied in the Treaty of Washington (*p*). By Art. 26 it is also declared that the exercise by a neutral State of the rights and powers conferred by the Convention shall not be regarded as an unfriendly act by a belligerent who has accepted the Articles relating thereto.

The Effect of the issue of a Commission to a Vessel illegally fitted out.—The Geneva Tribunal, as we have seen, ruled, in affirmance of the American contention, that the issue of a commission by a belligerent Government to a vessel that had been fitted out in violation of neutrality, could not be appealed to as a protection against acts done in violation of neutrality. Exterritoriality, it was said, was not an absolute right, but a proceeding founded only on comity and mutual deference, and was revocable in a case where those had been disregarded by the belligerent (*q*). But although exterritoriality in itself is only a mode of describing certain privileges and immunities which had their origin in comity or convenience, the privileges and immunities which it now implies are really substantive rights, and, as such, they are no more capable of being revoked at will than are the rights of embassy (*r*). In such a case, therefore, although the neutral State has its remedy against the Government in fault, it would seem that it has no remedy, at any rate by way of seizure, against the vessel itself, if once the latter has acquired the status of a public vessel. Nor would this be affected by the fact of the vessel having been commissioned merely by the

(*m*) As to the apparent inconsistency between this Article and those which allow a limited supply of provisions, fuel, and repairs necessary for navigation, see p. 355, *infra*.

(*n*) *Supra*, p. 309.

(*p*) *Supra*, pp. 325, 329.

(*q*) *Supra*, p. 336.

(*r*) See vol. i. 293.

Government of an insurgent community, provided its belligerency had been recognized; for this in itself is an acknowledgment of capacity to answer for conduct connected with the war (*s*). At the same time, it would be quite open to a neutral State whose neutrality had been violated to forbid any further use of its ports to an offending vessel; for such a right—although presumed in default of notice to the contrary—may nevertheless be revoked, and any protest on the ground of discrimination would be adequately met by proof of the prior violation of neutrality (*t*).

THE TREATMENT OF BELLIGERENT WARSHIPS IN NEUTRAL PORTS.

i. THE RULE OF TWENTY-FOUR HOURS' INTERVAL.

THE CASE OF THE "TUSCARORA" AND THE "NASHVILLE."

[1861-2. Bernard, British Neutrality during the American Civil War, 267.]

Case. In 1861, during the American civil war, the "Nashville," a Confederate cruiser, put into dock at Southampton in England, for the purpose of repairs. Soon afterwards the "Tuscarora," a United States cruiser, also entered British waters, and took up her station at the head of Southampton Water, some ten miles below the dock. According to the neutrality regulations then in force, no ship of war of either belligerent was permitted to leave any British port or waters from which any vessel belonging to the other belligerent, whether a ship of war or merchant vessel, had previously departed, until after the expiration of twenty-four hours from the time of such departure. Taking advantage of this rule, the captain of the "Tuscarora," with the aid of timely information furnished by agents in Southampton and by keeping his ship in readiness for instant departure, was able to take pursuit of the "Nashville," whenever the latter proposed to leave. This had the effect of compelling the local authorities to prevent the departure of the "Nashville" for twenty-four hours; and before this period elapsed the "Tuscarora" returned to her

(*s*) See Hall, 91; [illegible] Pt. C., No. 13, p. 1907, and Westlake, II. 216. [illegible] of [illegible] 3).

station. By repeating this operation she was enabled for some time virtually to blockade the "Nashville" in British waters. In order to prevent a repetition of this proceeding the British Government issued a fresh regulation, providing that any war vessel of either belligerent entering a British port should be required to depart and put to sea within twenty-four hours of her entrance into such port, except in cases of stress of weather, or want of provisions or other things necessary for the subsistence of the crew, or need of repairs; in either of which cases she was to be required to put to sea as soon as possible after the expiration of twenty-four hours.

To prevent the use of neutral ports or waters by belligerent vessels as a starting-point for belligerent operations, various rules have at different times been devised. One of these prohibits belligerent warships from lying in wait in territorial waters, and avoids all consequent captures (*a*). Another prohibits belligerent warships from using neutral ports for the purposes of obtaining information as to enemy vessels likely to arrive and sallying out to meet them (*b*). Another rule, which is of some antiquity, prohibited belligerent warships from following an enemy of inferior strength, and especially a merchant vessel, out of a neutral port, with a view to attack and capture. This was at first enforced, as against public vessels, by exacting an undertaking from the commander; and, as against privateers, by forbidding their departure until after the lapse of an interval of 24 hours or even longer. Subsequently the latter practice was extended to public vessels, and came to be known as "the 24 hours' rule." Such a rule was, as we have seen, included in the British neutrality regulations during the American civil war; whilst rules similar in effect (*c*) were adopted in the neutrality regulations of most other maritime States. In the result, the imposition of some such restraint on egress, not falling short of 24 hours (*d*), may probably be said to have become obligatory. Such a rule, with a definite limit of 24 hours, was incorporated in the Suez Canal Convention of 1888 (*e*), as well as in the Treaty of 1901 made between Great Britain and the United States with respect to the Panama Canal (*f*). It has now been adopted, although with a limit of "not less than 24 hours," by the Hague Convention, No. 13 of 1907 (*g*). This rule, with a view to distinguishing it from the rule of 24 hours' stay next referred to, is now commonly known as "the rule of 24 hours' interval" (*h*).

(*a*) *Supra*, p. 319.
(*b*) *Infra*, p. 373.
(*c*) Although differing sometimes in detail.
(*d*) Although optionally longer: *infra*, p. 381, n. (*b*).
(*e*) See vol. i. 151.
(*f*) *Ibid.* 153.
(*g*) See Art. 16: p. 362, *infra*.
(*h*) See Westlake, ii. 207; and on the subject generally, Hall, 623 *et seq.*

(ii) THE RULE OF TWENTY-FOUR HOURS' STAY; AND THE PRACTICE OF INTERNMENT.

THE CASE OF THE "MANDJUR."

[1904; Takahashi, 418—429.]

Case. For some time prior to the outbreak of the Russo-Japanese war the "Mandjur," a Russian warship, had been stationed at Shanghai. On or about the 14th February, 1904, after hostilities between Russia and Japan had begun, the Chinese Government issued neutrality regulations, which, amongst other things, prohibited the stay of belligerent warships in Chinese ports for more than twenty-four hours except in cases specified. Inasmuch as the "Mandjur," although not coming within these exceptions, nevertheless continued her stay, the Japanese Consul-General, on the 19th February, requested the Chinese authorities to require her to leave in accordance with the regulations. This demand was communicated to the Russian Consul-General, but the latter declined to comply with it until he had received instructions from his Minister. The matter was further complicated by the fact that a Japanese cruiser was alleged to be lying in wait for the "Mandjur" off Woosung. On the 22nd February the Japanese Minister at Pekin made a new and formal demand that the Chinese Government should proceed to disarm and intern the "Mandjur" if she did not quit Shanghai within twenty-four hours, failing which it was intimated that Japan might be forced to adopt measures, the responsibility for which would then rest with China. This produced its effect on the Chinese Government, and the disarmament of the "Mandjur" was resolved on and carried out. In the first instance, a limited disarmament involving only the removal of guns and ammunition, but accompanied by an undertaking that she should not leave Shanghai during the war, was proposed. But this was not approved by Japan; and, after some further negotiation, the vital parts of the machinery and the breech blocks of the guns were also removed and placed under Chinese control. The crew were sent back to their own country

under pledge not to engage in hostilities against Japan during the war.

This case serves to illustrate the application of the rule, now generally accepted in practice, which limits the duration of stay of belligerent vessels in neutral ports to 24 hours; as well as the treatment usually accorded to vessels that are unable or unwilling to leave within the time allowed. This rule is now commonly known as "the rule of 24 hours' stay." It is based on the need of preventing an abuse of neutral hospitality, and incidentally of preventing the use of neutral territory as a refuge from enemy constraint: although the latter ought in strictness to be regarded as the subject of a separate and independent rule (*b*).

The "rule of 24 hours' stay" has a much shorter history than the "rule of 24 hours' interval" (*c*). It was, as we have seen, originally adopted by Great Britain in 1862, with the object of preventing an abuse of the latter; and was enforced both by Great Britain and the United States in subsequent wars in which those Powers were neutral. It was later also adopted by other maritime States, such as Italy, Sweden and Norway, Denmark, and the Netherlands; but it was not at first formally accepted either by France, Germany, or Russia. This rule was likewise incorporated in the Suez Canal Convention of 1888, and in the Treaty of 1901 made between Great Britain and the United States with respect to the Panama Canal (*d*). During the Russo-Japanese war, the "rule of 24 hours' stay," with the alternative of disarmament in the event of non-compliance, was enforced not only in the case of the *Mandjur*, but in a great variety of other cases; and this even by Powers that had not previously accepted it (*e*); although in some cases its enforcement appears to have been based rather on the propriety of not allowing belligerent vessels to use neutral territory as an asylum from enemy constraint than on the duty of merely limiting their stay (*f*). It was also enforced against transports and colliers, as well as against warships proper (*g*). Finally, and probably in deference to these instances, the rule was embodied, although only in a qualified form, in the Hague Convention, No. 13 of 1907 (*h*). Its relation to the rule prohibiting belligerent vessels from using neutral ports as an asylum in war, will be considered hereafter (*i*).

(*a*) *Ante*, p. 357.

(*b*) *Ante*, p. 349.

(*c*) See vol. i. 151, 153.

(*d*) As by Germany, against Russian vessels taking refuge at Kiao-Chow; see Takahashi, 447 *et seq.*

(*e*) *Ante*, p. 357.

(*f*) As by China, at the instance of Japan, against certain Russian transports and colliers which had become separated from the Russian fleet and had taken refuge at Woosung, both vessels and crews being detained throughout the rest of the war: see Takahashi, 435 *et seq.*

(*g*) See Art. 12; and p. 361, *post*.

(*h*) *Ante*, p. 355.

III. THE SUPPLY OF COAL AND PROVISIONS.

THE CASE OF THE "TEREK."

[1905: Takahashi, 457.]

Case. On the 28th of June, 1905, during the Russo-Japanese war, the "Terek," a Russian cruiser, put into the port of Batavia, greatly in need of coal and provisions. Under the special regulations issued by the Dutch Government with respect to the use of the ports of the Netherlands-Indies during the war, belligerent vessels were forbidden to prolong their stay except in cases of necessity for more than twenty-four hours, or to take in supplies of provision or fuel beyond such an amount as might be necessary to carry them to the nearest port of their own country, no further supply being permitted within three months *et*. An application by the commander of the "Terek" to the Dutch authorities for a supply of provisions and coal was conceded to the extent allowed by the regulations, but an application for an extended supply was refused. On the expiration of twenty-four hours it was found that the coal taken on board would not suffice for the navigation of the vessel, and inasmuch as an extension of time was refused and the commander declined to leave the port with so little coal, the vessel was disarmed and detained, together with her officers and crew, for the remainder of the war.

The importance of coal in modern naval war necessarily led to some restriction being imposed on its supply to belligerent warships in neutral ports. The initiative in this respect appears to have been taken by Great Britain. Under the neutrality regulations issued in 1862, during the American civil war, the amount of coal that might be taken by a belligerent warship in a British port was limited to so much as would carry the vessel to the nearest port of her own country or some nearer destination, with a prohibition of any further supply at either the same or any other British port within three months, without special permission. This rule was based on the duty of the neutral State to abstain from supplying a belligerent vessel with the means of aggressive action, whilst at the same time it enabled her to obtain a sufficient supply to reach a home port—a denial of which would virtually have had the effect of plac-

(*a*) *Infra*, p. 382.

her out of action (*b*). This example was subsequently followed by other Powers; some Powers adopting the British regulation in its entirety, whilst others adopted it in substance although with some variation as regards details. During the Russo-Japanese war, Great Britain took the further step of denying even a limited supply of coal in cases where a belligerent fleet was proceeding either to the seat of war, or to a position or positions on the line of route with the object of intercepting neutral vessels on suspicion of carrying contraband. According to the instructions issued on the 5th August, 1904, to the naval commanders in chief, such a fleet was not to be permitted to make use in any way of a British port for the purposes of coaling, either directly from the shore or even from colliers accompanying the fleet, and whether the vessels of the fleet presented themselves at the port at the same time or successively; and the same rule was to be applied even to single belligerent war-vessels when manifestly bound on a similar errand, except in cases of actual distress (*c*). The French practice, however, was much more lax; the belligerents being allowed to take as much coal as would carry them to their next port, which was not confined to the nearest home port, and this without any limit of time (*d*) or any limitation on the renewal of supplies (*e*). A rule restricting the supply of fuel to belligerent vessels in neutral ports has now been embodied in the Hague Convention, No. 13 of 1907 (*f*).

With respect to provisions, the British practice was to limit supplies to an amount required for the subsistence of the crew (*g*). A restriction on victualling also finds a place in the neutrality regulations of certain other States, such as Holland and Brazil. But the restriction does not appear to have been either definite or obligatory, save in so far as it was applied in the duty of preventing neutral ports from being made a "base of supply" (*h*). A clause in restraint of "victualling" has, however, now been embodied in the Hague Convention, No. 13 of 1907 (*i*).

The pressure of these restrictions on the belligerent is, as will have been gathered from the case of the *Twee Gebroeders*, materially increased where supplies, whether of coal or provisions, are required to be taken within the time ordinarily available for, say, irrespective of special needs; a practice now implicitly affirmed by the same Convention (*k*).

(*a*) See Hall, 602.

(*b*) See Parl. Papers, Russia, No. 1 (1905), 11.

(*c*) Except where a warship is accompanied by a prize.

(*d*) A limit which gave rise to much discussion during the Russo-Japanese war; see *The Takasaki Maru*, 153.

(*e*) See Art. 19; and p. 362, *ante*.

(*f*) See the instructions issued in 1898 and 1904, p. 373, *ante*.

(*g*) See p. 349.

(*h*) See Art. 19; and p. 362, *ante*.

(*i*) See Arts. 14, 19; although provided in cases of damage and stress of weather, and, as regards coal, in cases where it cannot by local regulation be taken on board until twenty-four hours have elapsed; see also p. 362.

(iv.) THE QUESTION OF REPAIRS.

THE CASE OF THE "LENA."

[1904: Takahashi, 455; Hershey, 207.]

Case. On the 11th September, 1904, during the Russo-Japanese war, the "Lena," a Russian auxiliary cruiser, which had been previously engaged in cruising against Japanese commerce in the Pacific, put into San Francisco harbour greatly in need of repairs as regards her engines and boilers. Inasmuch as the effecting of the repairs would have meant a restoration of the fighting power of a vessel which was at the time virtually out of action, the Japanese Government instructed its Minister at Washington to bring the matter under the notice of the United States Government, and to request that appropriate measures might be taken without delay. The United States Government thereupon directed that the vessel should be inspected and the question of repairs reported on by the naval authorities. It having been ascertained that the repairs would take some six weeks to effect, and the vessel being unable to put to sea without them, the commander of the "Lena" himself admitted that the vessel must be disarmed, and requested that the repairs should be allowed on this condition. On the 15th September the President accordingly issued orders directing that the "Lena" should be taken into the custody of the naval authorities. In the result the vessel was first disarmed under official supervision, and thereafter repaired, but held in custody until the end of the war: the captain also giving a written guarantee that the vessel should not leave until after the conclusion of peace. The officers and crew were put on parole not to leave the United States territory during the war, unless some other understanding as to their disposal should be come to between the Government of the United States and both the belligerents (*a*).

Under the customary law, belligerent warships in neutral ports were commonly allowed to effect such repairs as were necessary to naviga-

(*a*) It appears that some of the Russian officers broke their parole; but on the demand of the United States they were ordered to return, and reduced in rank by way of punishment: see Hershey, 208, n.

tion, but not repairs or structural alterations which added to their fighting strength (*b*). Having regard to the rule which prohibits any increase in the fighting power of a vessel, the allowance of repairs, even within these limits, is sometimes criticized as illogical, for the reason that navigability and seaworthiness are equally indispensable to naval action; but the indulgence as regards repairs of a non-military kind is really founded on the exigencies of life at sea, and is in practice probably acceptable to both belligerents (*c*).

Under the earlier conditions of maritime war, the distinction between what we may call civil and military repairs was not hard to draw, but with the increasing complexity of the mechanism of warships its application became at once more difficult and more rigid. So, in the case of the "Lena," the right of repair was held not to cover repairs which, although primarily of a civil kind, were yet such as to involve the restoration of the vessel as a fighting unit. And although, in the case of repairs necessary to navigation and not of so extensive a character, an extension of the ordinary period of stay is usually granted, yet this will not extend to repairs against injuries sustained in battle. So when in June, 1905, the Russian cruisers "Aurora," "Oleg" and "Zamtchug" entered Manila after the battle of Tsushima greatly in need of repairs, and sought an extension of time for this purpose, the requisite permission was refused, on the ground that time cannot be given for the repair of injuries received in battle; with the result that all these vessels were detained until the close of the war (*d*). The question of repairs is, as we shall see, now regulated, as between the signatories, by the Hague Convention, No. 13 of 1907 (*e*).

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v. ASYLUM IN NEUTRAL PORTS.

THE CASE OF THE "ASKOLD" AND "GROZOVOI."

[1904: Takahashi, 429–435.]

Case. On the 13th August, 1904, the Russian warships "Askold" and "Grozovoi," after having been defeated in a naval engagement, sought refuge in the port of Shanghai. As these vessels showed signs of prolonging their stay beyond the time allowed by the Chinese neutrality regulations, the Japanese

(*b*) See Westlake, ii. 210; Taylor, 690.

(*c*) *Ibid.* p. 360.

(*d*) Although both in this and the previous case the internment was not probably a disadvantage to the weaker belligerent. Japan appears to have been satisfied with this and not to have pressed for disarmament: see Takahashi, 452.

(*e*) See Art. 17; and p. 363, *infra*.

Consul-General demanded that the Chinese authorities should either take steps to procure their immediate departure or disarm and intern them. This demand was notified to the Russian Consul-General, but the latter refused to comply on the ground that the vessels had a right to remain until repairs had been effected. As it appeared that these repairs were of an extensive character, the Japanese Minister at Pekin was instructed to protest against Chinese ports being used by Russian vessels as an asylum after defeat and for the purposes of repairs that would enable them to resume their belligerent operations; and to demand that they should be required to leave at once, or, if actually unseaworthy, then that they should be given two days within which to effect the necessary repairs with the alternative of being dismantled and interned if they failed to leave. The Chinese Government wavered: now demanding the departure of the vessels in deference to Japanese pressure, and now extending the time for departure in deference to the insistence of the Russian Consul-General; but on the 23rd August a further extension of time was granted.

Japanese Circular and Ultimatum. On the 25th August the Japanese Government—anticipating in view of what had occurred that it might be compelled to resort to measures of force, and having regard to foreign interests at Shanghai—thought it necessary to address to the Powers a circular note. This, after reciting the facts, pointed out that Japan could not be expected to submit to the continuance of a condition of things which constituted a menace at once to her belligerent rights and her commerce, and that she might therefore find herself forced to take action, the responsibility for which would rest with China. This was followed on the 26th August by an ultimatum addressed to China, requiring: 1. that the disarmament of the vessels should be commenced forthwith; 2. that all arms and ammunition, together with the essential portions of their machinery, should be landed and placed under Chinese control; 3. that the Russian flags should be hauled down; 4. that no repairs affecting the fighting capacity of the vessels should be permitted; 5. that the vessels so disarmed should be placed in the custody of the

Chinese authorities and under no condition allowed to depart; and (6) that the crews should be interned by China till the end of the war. In the result, and after some further controversy with respect to the disposal of the crews, these demands were in substance complied with; and both vessels and crews were detained throughout the remainder of the war (*a*).

On principle it would seem that where a belligerent warship seeks the shelter of a neutral port as a protection against enemy constraint or capture, both the vessel herself and those on board should, like a fugitive force on land (*b*), be subject to internment; and this without that benefit of stay or supplies or repairs which would otherwise be permissible. But, so far, no such restriction has been imposed; probably for the reason that the intent to seek shelter from attack would often be difficult to prove, and that such a rule might lead to friction between neutrals and belligerents. Nor do the provisions of the Hague Convention, No. 13 of 1907, appear to countenance any such distinction (*c*). Nevertheless, even under the law as it now obtains, the fact of the neutral port having been sought by a belligerent vessel after an engagement with the enemy, will put the neutral State under an obligation even more stringent than usual to see that the ordinary neutrality regulations are closely observed, and to disarm and intern any vessel that may overstay her time or be unfit to take the sea. And this appears to have been the position taken up by Japan as a belligerent, and for the most part conceded by Powers that were neutral, during the war of 1904-5. So, when the Russian warships "Czarevitch" and "Novik," with several smaller vessels, took refuge on the 10th August, 1904, after a naval engagement, in the German port Kiaochow, the "Novik," which was seaworthy, was ordered to leave within twenty-four hours, whilst the "Czarevitch" and other vessels, which were unseaworthy, were disarmed and interned together with their crews till the end of the war (*d*). The same course was taken by France, although only after some delay, in the case of the "Diana," a Russian cruiser which in similar circumstances took refuge at Saigon (*e*).

(*a*) The crews were interned in various Chinese treaty ports having Russian consulates: see Hershey, 206.

(*b*) See p. 314.

(*c*) See Art. 12; and Pearce Higgins, 471.

(*d*) Takahashi, 447 *et seq.*

(*e*) See Hershey, 204; Hall, 623, n.

(vi) THE RECEPTION OF PRIZES INTO NEUTRAL PORTS.

THE CASE OF THE "TUSCALOOSA."

[1872; Papers relating to the Treaty of Washington, i. to iv.]

Case. In 1863, during the American civil war, the "Conrad," a United States merchant vessel, was captured by the "Alabama," and thereupon converted into a tender to the latter vessel: an officer and crew with two small guns being put on board, and her name changed to the "Tuscaloosa." In this character the "Tuscaloosa" afterwards put into Table Bay. The United States Consul protested against her admission on the ground that she had not been regularly condemned, and that, as a prize, her admission into British ports was prohibited by the neutrality regulations. The Attorney-General of the Colony, however, held that having received her armament from a duly commissioned vessel, and being commanded by a duly commissioned officer, she was entitled to be treated as a public vessel. After the "Tuscaloosa" had left, the opinion of the British Law Officers was taken on the subject. This opinion was to the effect (1) that the vessel had not ceased to have the character of a "prize" merely by reason of what had been done; and (2) that the allegations of the United States Consul should have been communicated to Captain Semmes and an enquiry held; whilst (3) it was also suggested, as a matter deserving consideration, whether, on its appearing that the vessel was still an uncondemned prize, the exercise of any further control over her by the captors should not have been prohibited. On the subsequent return of the "Tuscaloosa" to Table Bay she was seized by the Colonial authorities; but on the protest of her commander, and in deference to an opinion of the Law Officers that the seizure could not be upheld in view of her previous recognition as a public vessel, orders were issued for her restoration. In the result, however, she remained in the custody of the local authorities until the end of the war, and was then handed over to the United States. Although Great Britain was ultimately held

responsible by the Geneva Tribunal for the acts of the "Tuscaloosa," as tender to the "Alabama" (*a*), the question now under consideration was not specifically dealt with.

Under the customary law, it was quite open to, although not obligatory on, a neutral State to admit prizes taken by a belligerent, whether from neutrals or from enemies, into its ports: and also to allow the captor to deposit them there pending condemnation and sale; so long only as this privilege was extended to both belligerents alike, and no prize jurisdiction was exercised in neutral territory. In fact, however, this was often prohibited or restrained under the municipal regulations of particular States. But if no such restriction was imposed, then on admission to the neutral port both prize and crew were entitled to the protection of the flag of the captors, and were exempt from the neutral jurisdiction (*b*), unless it could be shown that the prize had been captured in violation of the neutrality of the territorial Power (*c*). The practice of admitting prizes to neutral ports, save in cases of distress, is, however, bad in principle and undesirable in the neutral interest. It is bad in principle, for the reason that the captor, in being allowed to carry his prize into a neutral port prior to condemnation, is granted its shelter for property which does not yet belong to him (*d*); that, in being allowed to exercise control over the prize and the captured crew, he is virtually allowed to continue an act of war in neutral territory; and, finally, that in being allowed to deposit his prize there, he is enabled to set the prize crew free and thus to make use of neutral territory for adding to his military strength (*e*). It is also undesirable in the neutral interest, in so far as it exposes the territorial Power to the risk of armed conflicts occurring in its ports between the captors and the crew of the captured vessel. It was probably in deference to these considerations (*f*) that in the latter part of the nineteenth century the practice of admitting prizes into neutral ports came to be greatly restricted by municipal regulation; some States prohibiting altogether the bringing of prizes into their ports except in cases of distress; others excluding them from certain ports; whilst others again admitted them but restricted their stay to twenty-four hours and forbade their sale. The British rule, which was first adopted in 1861 and followed in subsequent wars, was to exclude them altogether (*g*). A rule limiting

(*a*) *Supra*, p. 333.

(*b*) See vol. i. 259.

(*c*) See Hall, 613 *et seq.*; Westlake, ii. 213 *et seq.*; and as to the validity under the English prize law of a sentence of condemnation passed on a prize lying in a neutral port, p. 192, *supra*.

(*d*) *Supra*, p. 211; but see Hall, 614.

(*e*) Hall, 614.

(*f*) At any rate, in the later period, for the earlier restrictions were directed rather against privateers: see Westlake, ii. 214.

(*g*) As to the practice of other States, see Westlake, ii. 214; Hall, 615; Taylor, 699.

their stay to twenty-four hours also finds place in the Suez Canal Convention of 1888, and the Panama Canal Treaty of 1901 (*h*). But the usage was not sufficiently long established or uniform to have become obligatory. The admission of prizes into neutral ports is now regulated, as between the signatories, by the Hague Convention, No. 13 of 1907 (*i*), which, whilst adopting exclusion as the normal rule, yet recognizes a discretionary exception in favour of prizes brought into neutral ports to be sequestrated pending the decision of a prize Court; an exception which is also bad in principle and contrary to the trend of previous usage.

General Notes. *The Admission of Belligerent Warships into Neutral Ports.* Another great difference between land and sea warfare is that, whilst the land forces of a belligerent may not ordinarily be received in neutral territory except on condition of being disarmed and interned, belligerent warships may not only enter neutral ports, but may also take fuel and supplies and effect repairs there, and employ the licensed pilots of the territorial Power in their passage through neutral waters (*k*), without in any way involving the neutral State. The reason for this difference lies in the fact that the shelter of neutral territory in land warfare is almost invariably sought under the pressure of superior force; whilst in sea warfare it is treated as an ordinary incident of navigation. A neutral State is not indeed bound to open its ports to belligerent warships, except in cases of distress; and may close them either in whole or part if it thinks fit and gives proper notice of its intention (*l*). So, in 1853, Austria closed the port of Cattaro; in 1862, Great Britain closed the ports of the Bahama islands; whilst in 1904, Sweden-Norway similarly closed a number of its ports and fjords, to the entry of belligerent warships. But in default of notice a right of entry, with all consequent privileges in so far as these are consistent with war, will be presumed. The use of neutral ports by belligerent warships is, however, subject to certain restrictions which arise in part under the general law and in part under the local neutrality regulations; some being obligatory, whilst others are left to the discretion of the territorial Power subject only to this being exercised impartially. These restrictions, in so far as they arise on the customary law, have already been considered; but it still remains to see how far they have been declared or modified by Convention.

Limitation on Numbers. Prior to 1907, there was no usage limiting the number of belligerent warships that might be present at the same time in a neutral port, although such a limit was sometimes

(*h*) See vol. i. 151, 153.
(*i*) See Arts. 21, 22 and p. 363, *infra*.
(*k*) See H. C., No. 13 of 1907, Art. 11.
(*l*) See vol. i. 251, 254.

imposed alike in time of peace and war by municipal regulation. On this subject the Hague Convention, No. 13 of 1907, now declares that, unless the laws of a neutral Power otherwise provide, the number of warships belonging to one belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall not exceed three (*m*). The terms of the article, it will be seen, leave it open to the neutral Power to allow the presence of a larger number of vessels, whilst they are consistent with the refusal of access to any.

Duration of Stay. The "rule of 24 hours' stay," which was previously, as we have seen, the subject of some conflict of practice (*n*), has now been embodied in the Hague Convention, No. 13 of 1907, although only in a form which greatly impairs its effect. On this subject, the Convention provides: (1) That in default of special provisions to the contrary in the laws of the neutral Power, belligerent warships shall not remain in the ports, roadsteads, or territorial waters of the said Power for more than 24 hours, except in cases covered by the Convention (*o*). (2) That if a Power which has been informed of the outbreak of hostilities learns that a warship of a belligerent is in one of its ports or roadsteads or in its territorial waters, it must notify the said ship to depart within 24 hours or within the time prescribed by the local law (*p*). (3) That a belligerent warship may not prolong its stay in a neutral port beyond the time permitted, except on account of damage (*q*) or stress of weather, and must depart as soon as the cause of the delay is at an end (*r*). But these regulations are not to apply to warships devoted exclusively to religious, scientific, or philanthropic purposes (*s*). This Convention appears to represent a compromise between the conflicting views of Powers (*t*) which had previously adopted the rule of 24 hours' stay and those which had not (*u*). Its general effect is to establish the rule of 24 hours' stay as the normal requirement, to which no exception can be taken by either belligerent, but at the same time to leave it open to a neutral Power to make other regulations if it thinks fit (*x*). In the future the rule of 24 hours' stay, although made discretionary by the Convention, will probably be generally adopted in practice, notwithstanding some reservations made by particular Powers (*y*). The extension of stay contemplated in the case of repairs would not, it seems, properly extend to the repair of injuries received in battle, or repairs so extensive as to

(*m*) Art. 15.

(*n*) [illegible], p. 351.

(*o*) Art. 12.

(*p*) Art. 13. This was probably intended to meet such cases as that of the *Wolf* (1904).

(*q*) See Art. 17; and p. 363, *infra*.

(*r*) Art. 14.

(*s*) Art. 14.

(*t*) Such as Great Britain and the United States.

(*u*) Such as France, Germany, or Russia; see Pearce Higgins, 170.

(*x*) But such regulations must, like all other regulations affecting the position of belligerent warships in the ports of the signatories, be notified to the Netherland Government for communication to the contracting Powers: Art. 27; and must apply equally to both belligerents: Art. 9.

(*y*) Germany, for instance, has signed the Convention under reservation of Arts. 12 and 13.

involve a restoration of the fighting power of a vessel which was at the time completely disabled (*z*).

The Time and Order of Departure.—"The rule of 24 hours' interval" has likewise been adopted by the same Convention. With respect to this it is provided: (1) That when warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than 24 hours must elapse between the departure of a vessel belonging to one belligerent and the departure of a vessel belonging to the other. (2) That the order of departure shall be determined by the order of arrival, unless the vessel that arrived first is so circumstanced that an extension of stay is permissible. (3) That a belligerent warship shall not leave a neutral port or roadstead until 24 hours after the departure of a merchant ship flying the flag of its adversary (*a*). The Convention thus settles definitely the question of the order of departure, as to which there had previously been some diversity of practice.

Supplies of Coal and Provisions.—With respect to supplies of coal and provisions the same Convention provides in effect: (1) That belligerent warships in neutral ports or roadsteads may only revictual so as to bring their supplies up to peace standard (*b*). (2) That such vessels may similarly ship only sufficient fuel either to enable them to reach the nearest port of their own country, or, in the case where the neutral Power has adopted this method of determining the supply of fuel, to fill up their bunkers built to carry fuel; with liberty, however, to extend their stay for this purpose in cases where the local law (*c*) prohibits the taking of coal until 24 hours after arrival (*d*). (3) That belligerent warships which have already shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power (*e*). With respect to coal the rule is, it will be seen, less stringent (*f*) than that previously followed by countries such as Great Britain and the United States; and does not, like the later British rule, exclude altogether a supply of coal for aggressive action (*g*). No provision is made for an extension of time for the purpose of revictualling, or even for coaling, except in the case where the neutral regulations forbid coaling until 24 hours after arrival (*h*). The restrictions imposed by the Convention on the supply of coal would appear to apply equally to oil in cases where that is used for fuel.

(*z*) *Supra*, p. 355.

(*a*) See Art. 16. Although a merchant vessel may, if it chooses, follow a warship without any such interval being interposed.

(*b*) Art. 19.

(*c*) As in the case of Italy.

(*d*) Art. 19. But Great Britain and Japan have both signed the Convention under reservation of this Article.

(*e*) See Art. 20. But Germany signed under reservation of this Article.

(*f*) That is, in view of the alternative given.

(*g*) *Supra*, p. 353; although there is no saving, as under the British regulations, for cases of "special permission."

(*h*) As to the course of discussion on this point, see Pearce Higgins, 476.

The Execution of Repairs. On the question of repairs the Convention provides in effect: (1) That belligerent warships in neutral ports or roadsteads may only carry out such repairs as are absolutely necessary, and may not in any manner whatever add to their fighting force. (2) That it shall rest with the local authorities of the neutral States to decide what repairs are necessary, and that these shall be carried out with the least possible delay (*i*). These provisions apply only to neutral ports and roadsteads, and not to other territorial waters, where the effecting of repairs, although difficult to accomplish, would for the most part be beyond the control of the territorial Power. By implication it would seem that an extension of stay is permissible for effecting of repairs in the case where these are necessary to navigation (*k*).

The Reception of Prizes in Neutral Ports. On the question of the admission of prizes into neutral ports, the Convention provides in effect: (1) That a prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions (*l*), and that in the latter circumstances it must leave as soon as the justification has come to an end (*m*). (2) That if it does not, the neutral Power must order it to leave at once, and failing compliance must employ the means at its disposal to release the prize with its officers and crew, and intern the crew put on board by the captor (*n*). (3) That a neutral Power must similarly release a prize that has entered its ports without such justification (*o*). (4) That a neutral Power may, nevertheless, allow prizes to enter its ports and roadsteads, whether under convoy or not, in cases where they are merely brought there to be sequestrated pending the decision of a Prize Court; with a consequent right to have the prize taken to another of its ports if it so desires. In such cases, if the prize is under convoy of a warship the prize crew of the captor may go on board the convoying ship, whilst if not under convoy they are to be left at liberty (*p*). The effect of these provisions is to affirm generally the practice of non-admission except in cases of distress, and to sanction formally the exercise by the neutral State of all consequent authority. At the same time the general rule is greatly qualified in effect by the permission granted to the neutral State to allow prizes to be deposited in its ports pending the decision of the Prize Court of the captor. By adopting this qualification the Convention virtually prolongs a practice which is in itself vicious (*q*), and which would otherwise probably have come to be barred by custom (*r*); and this, apparently, without any compensatory advantages of a tangible kind (*s*).

(*i*) Art. 17.
(*k*) That is, from Art. 17 taken in conjunction with Art. 14.
(*l*) Art. 21.
(*m*) Art. 21.
(*n*) Art. 21.
(*o*) Art. 22.
(*p*) Art. 23. The crew of the captured vessel, if on board the prize, are apparently left to the operation of the earlier law: see vol. i. 259.
(*q*) *Supra*, p. 359.
(*r*) *Supra*, p. 360.
(*s*) It was originally adopted with

Penalty for Infringement of Neutral Regulations.—Apart from the remedies available for more serious violations of neutrality, which have already been considered (*t*), special remedies are provided by the same Convention for breaches of or non-compliance with the local neutrality regulations. So, it is provided that if a belligerent warship has previously failed to conform to the regulations of a neutral Power, or has violated its neutrality, the vessel may be forbidden for the future to enter its ports or roadsteads (*u*); a course which, despite some contrary opinion, appears to have been previously permissible (*y*). Again, it is provided that if a belligerent warship, after notification, fails to leave a neutral port when it is not entitled to remain, the neutral Power may take such measures as it may deem necessary to render the vessel incapable of putting to sea so long as the war lasts, the commanding officer being even required to facilitate the execution of such measures (*z*). In such a case the officers and crew must likewise be detained, either on the vessel itself, or on any other vessel, or on land (*a*), and may for this purpose be subjected to all necessary restraints; although the officers may be left at liberty on giving their word not to leave neutral territory without permission (*b*). The question of internment—a practice which was, as we have seen, carried out with no little severity during the Russo-Japanese war (*c*)—is thus left by the Convention in the discretion of the neutral, which is so far a defect; although pressure on the part of the other belligerent will probably serve in general to ensure its exercise. The Convention, however, now settles definitely that the officers and crew of a vessel interned must also be detained, which, although clear in principle, had formerly been a subject of controversy (*d*). It is also expressly declared by the Convention that the exercise by a neutral power of any of the rights conferred thereby shall not be considered as an unfriendly act by a belligerent who has accepted the articles relating thereto (*e*). In cases of sufficient gravity the remedy of expulsion will also be open to the neutral, although in practice a weak neutral is naturally indisposed to attempt to enforce this against a powerful belligerent.

a view to enabling an agreement to be reached on the question of the destruction of neutral prizes and should strictly have lapsed with the failure of this agreement. It was, however, sought to retain the right of admission as being likely to render less frequent the destruction of prizes by a belligerent captor having no home port near at hand; although the fact of such admission being discretionary on the part of the neutral renders this doubtful, whilst in any case the existence of such a right may evidently lead to friction between neutrals and belligerents: see Pearce Higgins, 478 *et seq.*; and, as to the present provisions of the Declaration of London, *infra*, p. 486.

(*t*) *Supra*, p. 298.

(*u*) Art. 9.

(*y*) See vol. i. 261; and [illegible] p. 348.

(*z*) Art. 24.

(*a*) Subject to a sufficient number of men being left on board to look after the vessel.

(*b*) Art. 24.

(*c*) *Supra*, p. 351.

(*d*) See *supra*, pp. 280, 354, 357; and Takahashi, 434, 482.

(*e*) Art. 26.

LOANS TO AND VOLUNTARY SUBSCRIPTIONS IN AID OF BELLIGERENTS.

AN OPINION OF THE LAW OFFICERS OF THE CROWN, 1823.

[Phillimore, iii. App. 928.]

Questions submitted. In 1823, the Law Officers of the Crown (*a*) were consulted by the British Government with respect to the legality of subscriptions or loans by neutral subjects in aid of a belligerent—apparently on the occasion of a proposed loan in aid of the Greek War of Independence. The questions submitted were: (1) Whether subscriptions for the use of one of two belligerent States by individual subjects of a nation professing and maintaining a strict neutrality between them were contrary to the law of nations, and constituted such an offence as the other belligerent would have a right to consider as an act of hostility on the part of the neutral Government? (2) Whether—assuming that such individual voluntary subscriptions in favour of one belligerent would give just cause of offence to the other—loans for the same purpose would give the like cause of offence? (3) And, if not, where the line should be drawn between a loan at an easy or mere nominal rate of interest or with a previous understanding that interest would never be exacted and a gratuitous voluntary subscription?

Opinion. The opinion given was as follows: (1) Subscriptions of the nature alluded to, for the support of one of two belligerent States against the other, entered into by individual subjects of a Government professing and maintaining neutrality, would be inconsistent with that neutrality and contrary to the law of nations. At the same time the other belligerent would not have a right to consider such subscriptions as constituting an act of hostility on the part of the Government, although they might afford just ground of complaint if carried to any considerable extent. (2) With respect to loans, these, if entered into

(*a*) Sir R. Gifford, A. G.; Sir J. S. Copley, S.-G.; and Sir C. Robinson, K.A.

merely with commercial views, would not, according to the opinion of writers on the law of nations and the practice hitherto prevalent, be an infringement of neutrality. (3) But if, under colour of a loan, a gratuitous contribution was afforded without interest or with merely nominal interest, then the matter would be governed by the same principle as that applicable to voluntary subscriptions.

In effect the view of the Law Officers of the Crown was that under the law of nations, as it then obtained, loans by neutral individuals to either belligerent were permissible if made purely in the way of business; but that voluntary subscriptions in aid of a belligerent were strictly illegal, although not to be regarded as a ground of offence internationally unless carried to any great extent. And this may probably be said to be a correct statement of the existing law (*b*).

With respect to the legality of loans or subscriptions on behalf of belligerent States under the municipal law, this would appear, according to the English and American cases, to depend primarily on the question whether the transaction is opposed or not to public policy, which will again depend on the question of its legality under the law of nations. Hence loans made purely in the way of business, being internationally permissible, are not contrary to public policy, and are therefore valid (*c*); whereas voluntary subscriptions in aid of one belligerent, being a cause of offence to the other and tending for this reason to involve the State in foreign complications, are illegal (*d*). With respect to loans to insurgents, if the insurgent Government has been recognized by the lender's Government as independent or even as belligerent, loans made to it would be equally valid with those made to a belligerent State, for the reason that this amounts to a recognition of capacity to do all acts that can be lawfully done in carrying on the war, of which the raising of loans is one (*e*); whilst voluntary subscriptions would of course be illegal. But an advance of money, whether by way of loan or subscription, to unrecognized insurgents, in arms against a friendly Government, would be internationally improper, because loans for promoting an

(*a*) *Infra*, p. 367.

(*b*) The English and American cases deal, for the most part, with the question of loans to insurgents. In *Frisard* v. *Clement* (10 Mod. C. P. 317) there is, indeed, *dictum* questioning the legality of loans to a belligerent State, whilst in *Kennett* v. *Chambers* (14 How. 38) the question is left open; but the *dictum* in the former case is merely *obiter*, and the true principle appears to be that suggested in the text.

(*c*) See an opinion by the same Law Officers, given on the 21st June, 1823 (cited in Halleck, ii. 164, n.), where, however, it is admitted that a criminal prosecution, as for a misdemeanour or conspiracy, would scarcely be likely to succeed.

(*d*) See *Kennett* v. *Chambers* (14 How. 38); Taylor, 191; and vol. i. 67; but see also Westlake, ii. 218.

insurrection cannot be regarded as coming within the range of commercial business or as being free from political motive (*f*); and would for this reason be illegal also in municipal law (*g*).

General Notes.—*Loans by Neutral Individuals to Belligerent States.*—It would, as we have seen, be a breach of neutral duty for a neutral Government either to make or promote or guarantee a loan of money to either belligerent (*h*). Some writers incline to the view that such loans are also illegal if made by neutral individuals, and should on that ground be prohibited by neutral Governments (*i*). But so far as relates to loans of a purely commercial kind, this view appears to find no warrant either in principle or in current usage. From the standpoint of principle, a neutral State is under no obligation to interfere with the commercial dealings of its subjects with either belligerent, unless they involve either a participation in some specific act of war or an illegal use of neutral territory (*k*); and this rule applies equally to dealings in money as in other commodities (*l*). Nor could such an obligation, even if it existed, be adequately discharged by a neutral Government, for the reason that such loans could, at any rate in cases where there was no public issue, be effected by methods incapable of detection (*m*). From the standpoint of current usage, the legality of such loans is equally unquestionable. So, in 1842, the Government of the United States, in reply to a protest made by Mexico, stated that "as to advances made by individuals to the Government of Texas (*n*), the Mexican Government hardly needs to be informed that there is nothing unlawful in this so long as Texas is at peace with the United States; and that there are things which no Government undertakes to prevent" (*o*). In 1854 a Russian loan was publicly issued in Amsterdam, Berlin, and Hamburg, and this in spite of some protest on the part of France (*p*). In 1870 both a French loan and a part of the North German loan were issued in London. In 1904 Japanese loans were issued in London and Berlin, and Russian loans in Paris and Berlin, without in either case provoking any remonstrance. But although such loans are permissible

(*f*) See Westlake, ii. 218; Wharton, Dig. iii. p. 508.

(*g*) See *De Hütz* v. *Hendricks* (9 Moo. C. P. 586); *Yrissari* v. *Clement* (11 Moo. C. P. 308); *Thompson* v. *Powles* (2 Sim. 194); *Kennett* v. *Chambers* (14 How. 38); Phill. iii. App. 930.

(*h*) *Supra*, p. 305.

(*i*) See Bluntschli, § 768; Calvo, § 1060; Phillimore, iii. 247; Halleck, ii. 163.

(*k*) *Supra*, p. 343; *infra*, p. 446.

(*l*) Subject, of course, to the risk of seizure as contraband if taken in transit. Gold and silver in coin or bullion, together with paper money, destined for the use of a Government department or its armed forces, are now made absolute contraband: see the Declaration of London, Art. 33.

(*m*) See Hall, 591.

(*n*) Which at that time had been recognized as an independent.

(*o*) See Taylor, 675; Hall, 591.

(*p*) As to the Confederate loan issued in England, see p. 331, *supra*, and Moore, Int. Arb. i. 620.

under the existing law, and although it would be obviously undesirable to attempt to interfere with dealings of a purely private character, it is probable that the general adoption of a rule prohibiting the "public issue" of loans on behalf of a belligerent might serve both to curtail the duration of wars and in some cases perhaps even to prevent their occurrence. But such an arrangement could only be reached by way of international agreement, and would then be binding only on the parties (*q*). The question of loans to insurgents, and the distinction in this regard between recognized and unrecognized insurgents, have already been considered (*r*).

Gifts and Voluntary Contributions. For a neutral State knowingly to allow contributions to be raised within its territory on behalf of either belligerent would undoubtedly be a breach of neutral duty in the case of international war; and a breach of duty even in the case of a civil war or insurrection; for such contributions can only have a political object and cannot be justified by the principle of freedom of commerce (*s*). Nevertheless they are hard to detect, and the duty of a neutral State in this regard is not one of absolute prevention, but only a duty of using all reasonable vigilance for the purpose of prevention. Hence if contributions on behalf of either belligerent are promoted by means of any public organization or appeal it will be its duty to intervene. But if only privately promoted — in which case they would probably be limited to belligerent subjects or some small body of neutral sympathisers—such contributions would probably pass unnoticed, and could not be regarded as a cause of complaint against the neutral Government (*t*). The furnishing of funds by persons resident in a neutral State on behalf of the sick and wounded, or in relief of suffering on either side, is not a breach of neutrality, and in recent wars this has been freely permitted (*u*). At the same time, even in this case, the official instrumentalities of the neutral State ought not to be lent or used for this purpose (*x*).

(*q*) On the subject generally, see Hall, 590; Westlake, ii. 217; Oppenheim, ii. 430; Moore, Digest, § 1311.

(*r*) *Supra*, p. 366.

(*s*) For instances in the Russo-Japanese war, see Hershey, 80 *et seq.*

(*t*) More especially as the amount would probably be insignificant. This, it is conceived, is the meaning of the words "carried to any conceivable extent," used in the opinion above cited, p. 365.

(*u*) See Moore, Digest, vii. 977.

(*x*) For examples, see Hershey, 81; Takahashi, 455.

NATIONAL NEUTRALITY LAWS.

(i) GREAT BRITAIN.

REG. *v.* JAMESON AND OTHERS.

[1896; 2 Q. B. 425; 65 L. J. M. C. 218.]

Case. In December, 1895, a considerable force of the British South Africa Co.'s armed police, under the command of Dr. Jameson, concentrated at Mafeking in British Bechuanaland, near the western frontier of the then South African Republic. Subsequently, in response to an appeal for aid from British residents in Johannesburg, who alleged that their lives and property were in danger from the Boers, Jameson and some 800 volunteers crossed the frontier and marched in arms on Johannesburg. Orders to return were sent both from London and Cape town, but were disregarded. The Transvaal Government, having succeeded partly by threats and partly by promises of reform in averting a rising at Johannesburg, despatched a strong force to meet the raiders, and after a sharp contest forced them to surrender. The prisoners were afterwards handed over for punishment to the British Government. Jameson and other leaders of the movement were thereupon brought to England; and were subsequently indicted under sects. 11 and 12 of the Foreign Enlistment Act, 1870. Sect. 11 provides that "if any person within the limits of H.M. dominions, and without the license of Her Majesty prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, every person engaged in such preparation . . . shall be guilty of an offence . . . and punishable by fine and imprisonment or either"; whilst sect. 12 provides for the punishment of accessories. Various objections to the applicability of the Act in the circumstances of the case (*a*) were taken on behalf of the accused but ultimately overruled (*b*). The accused were finally

(*a*) Made under sect. 2, which provides that it shall extend to all British possessions; and sect. 3, which provides it shall not apply where there has been a proclamation.

(*b*) The rulings in law were given in part in the Queen's Bench Division on motion to quash the indictment, in part by the Court at bar, and in part as directions to the jury.

tried at bar, and having been found guilty, were sentenced to various terms of imprisonment.

The Summing up.] Lord Russell of Killowen, L.C.J., in his summing up, referred to the general character and object of the Foreign Enlistment Act. It was, he pointed out, an expression by municipal law of the international obligations of the country. Its provisions were directed towards enforcing the strict neutrality of the Queen's subjects; and aimed at preventing the use of any part of the Queen's dominions as a base of hostile operations, not only against a Power at war but with which the country was at peace, but also against the sovereignty or territorial integrity of a foreign Power that was not then at war. It was, in fact, a partial expression of that duty which every Sovereign State owes to every other, viz., to use all reasonable efforts that its subjects did not violate international obligations. As regards the proof of an offence under sect. 11, such an offence was complete if it was shown that a person, without licence of the Crown, and in a place where the Act was in force, either prepared or assisted in the preparation of a military or naval expedition, with the intent that it should proceed against the dominions of a friendly State, whether in fact it did so proceed or not. Assuming such a preparation, moreover, as that described, a person might be guilty of participating therein, even though he was not himself within the Queen's dominions at the time, as where he sent guns or ammunition from a foreign country to a place where such a preparation was going on. A person might also commit the offence of taking employment in such an expedition, even though he had not engaged or assisted in its preparation; and even though he accepted such employment outside the Queen's dominions, as where he joined it after it had left those dominions. But in each case there must be knowledge that the expedition so proposed was intended to proceed against the dominions of a neutral State. As to what constituted an illegal expedition, it must be one which intended by force, or show of force, either to interfere with the constituted Government, law, or administration, or to bring about some change therein. Nor would the result be in any way affected by the fact

that those who participated in it did not seek the actual overthrow of the Government or were actuated by motives of philanthropy or humanity.

A neutral State is bound not only to observe the obligations of neutrality in its own public action, but also to use vigilance in enforcing a like observance on all persons found within its jurisdiction (*c*). Hence most States have found it necessary to pass laws or enact regulations for ensuring the observance of their neutrality. These constitute the national law of neutrality, between which and the general law of neutrality there is in practice, even though not in theory, a certain intimacy of relation (*d*).

In the case of Great Britain, the first real neutrality law was the Foreign Enlistment Act, 1819, which was passed in consequence of the part taken by British subjects in the war then prevailing between Spain and her American colonies (*e*). This Act—59 Geo. III. c. 69—was directed more especially against illegal enlistment, the fitting out without licence from the Crown of armed vessels for employment against a friendly State, or the delivery of commissions to such vessels, and the augmentation of the force of foreign war vessels (*f*). The disputes that occurred between Great Britain and the United States over the "Alabama claims" (*g*), served to direct attention to the defects of this Act, and a special Commission was appointed to enquire into and report on the subject (*h*), with the result that the earlier Act was soon afterwards replaced by the Foreign Enlistment Act, 1870 (*i*). This Act in effect: (1) Makes it an offence punishable by fine and imprisonment, or either, for any person within British jurisdiction (*k*) to enlist, or to induce any other person to enlist without licence (*l*) in the service of any foreign State (*m*) at war with a friendly State (*n*). (2) It attaches a similar penalty, in addition to the forfeiture of the ship and her equipment, to the

(*c*) *Supra*, p. 283; and, as to the extension of this duty to cases of civil war or insurrection against a friendly Power, p. 318-9.

(*d*) *I. fin.*, p. 380.

(*e*) The earlier statutes against foreign enlistment, such as 3 Jac. I. c. 4, s. 18; 9 Geo. II. c. 30; and 29 Geo. II. c. 17, were designed [illegible] to [illegible] the recruitment of [illegible] Powers from [illegible] subjects [illegible] Law, [illegible] punishable [illegible] the Act [illegible] 2 H. C. 193, [illegible] usually referred to; and [illegible] C. 3 B. C. 218, [illegible] Act applied [illegible] to [illegible] aid of [illegible] States.

[illegible] 24.

(*f*) The report was published in 1867.

(*g*) 33 & 34 Vict. c. 90.

(*h*) Or for a British subject anywhere.

(*i*) The licence referred to is a [illegible] from the Crown, duly signified [illegible] required by sect. 15.

(*k*) By virtue of the interpretation clause, sect. 30, this includes any province or part of a State, or any persons assuming to exercise government in or over the same; see [illegible] *supra*.

(*l*) Sect. 4. Provision is also made for the punishment of [illegible] aid or abet the [illegible] principal offence [illegible] 5, 6, 7

following acts: (a) Building, or agreeing to build a ship with intent or knowledge, or with reasonable cause for belief, that the same is to be employed in the military or naval service of any foreign State at war with a friendly State; (b) issuing a commission to any ship with the like intent; (c) equipping any ship with the like intent; or (d) allowing the despatch of any ship with the like intent.(*o*). But these penalties are not to attach to a person who is building or equipping a ship in pursuance of a contract made before war, provided he gives notice, upon the issue of a proclamation of neutrality, to the Secretary of State, furnishes the required particulars, and gives security against the removal of the ship before the termination of the war (*p*). It also makes it an offence, similarly punishable, for any person within Her Majesty's dominions and without licence (*q*) to assist in the warlike equipment or augmentation of the force of any ship in the naval or military service of a foreign State at war with a friendly State (*r*); or (b) to fit out, or assist in the fitting out of, any naval or military expedition against the dominions of any friendly State (*s*). (c) All ships or goods captured either in violation of this neutrality, or by any ship built, equipped, commissioned, despatched, or augmented in force, in violation of that neutrality, and subsequently brought into British ports by the captor or by any other person having possession with knowledge of such illegality, are to be restored on application made to the Court by the owner or the State to which he belongs (*t*). The Act, with a view to the prevention of such offences, enlarges considerably the powers of the executive, (a) by empowering the Secretary of State (*u*), if satisfied that a ship has been built, equipped, or commissioned contrary to the Act, to issue a warrant of arrest (*v*), (b) by empowering "local authorities" to arrest or detain a ship, even without such a warrant, on information to the same effect reasonably believed by them to be true (*w*), and (c) by empowering the Secretary of State (*x*), in case of rebellion, to issue a search warrant, even into the dockyard or other places (*y*). All proceedings under the Act in the adjudication of vessels must have the sanction of the Secretary of State or chief executive authority, and all such cases must be tried in the Court of Admiralty, which for the purpose is invested with all its ordinary powers in addition to those conferred by the Act (*z*). In the case where a ship has been seized or detained [illegible]

(*o*) S. 7. The "like intent" in this case is limited to cover "building or equipping or having reasonable cause to believe"; and in the case of "allowing despatch" the offence is made dependent upon the commission being proved.

(*p*) S. 8.

(*q*) S. 10.

(*r*) Any ship or vessel, or arms or munitions of war levelled [illegible] (s. 11; and as to the punishment of a person [illegible] this and other offences under the Act, s. 12.

(*s*) S. 11.

(*t*) On the effect of [illegible] see p. 373, *post*.

(*u*) Ss. 23, 24.

(*v*) Ss. 21, 22, 24.

(*w*) S. 24.

(*x*) S. 25.

(*y*) Ss. 29, 30.

(*z*) S. 23.

all persons acting in pursuance of the powers conferred by the statute are personally exempted from liability (*b*). The Act itself is made applicable to all British dominions, including adjacent territorial waters (*c*); the powers conferred by it on the Secretary of State being exerciseable in certain places outside Great Britain by certain specified officers, and in any British possession by the Governor (*d*).

The observance of neutral duties, on the outbreak of war between other States, is further inculcated and enforced by a Proclamation of Neutrality and by the issue of special Neutrality Orders. So, on the 11th February, 1904, on the outbreak of the Russo-Japanese war, a Proclamation was issued (1) enjoining the strict observance of all neutral obligations, whether imposed by municipal or international law; (2) setting out those sections of the Foreign Enlistment Act, 1870, which deal with illegal enlistment, shipbuilding, and expeditions (*e*), as well as the purport of other sections dealing with procedure (*f*); and finally (3) directing attention to the fact that persons engaging in the carriage of contraband, or breach of blockade, or other acts in derogation of neutral duty, were subject to the risks of belligerent capture and could claim no protection from their own Government (*g*).

The Neutrality Orders issued on the same occasion (*h*) were in effect as follows: (1) Belligerent warships were prohibited from using British ports or territorial waters as a station or resort for any warlike purposes, or for obtaining facilities for warlike equipment. (2) No ship of war of either belligerent was to be permitted to leave any port or waters from which any vessel, whether a warship or merchant ship, of the other belligerent had departed, until after the expiration of at least 24 hours. (3) Any belligerent warship entering a British port or territorial waters was required to depart within 24 hours after her entrance, except in cases of stress of weather, or of her being in need of things necessary for subsistence, or of her being in need of repairs: in which cases she was to be required to depart as soon as possible thereafter, without being permitted to take supplies except such as might be necessary for immediate use, or in the case of repairs, within 24 hours after the necessary repairs had been effected: but subject in all cases to the rule of 24 hours' interval. (4) No ship of war or other belligerent vessel in British ports or waters was to be permitted to take in any supplies except provisions and other things requisite for the subsistence of her crew, and coal sufficient to carry her to the nearest port of her own country, or to some nearer named neutral destination: and no coal was to be supplied to the same ships in the same country other British port or waters, without

(*b*) Ss. 28, 29.
(*c*) S. 2.
(*d*) S. 26.
(*e*) S. 4 (1); [illegible] 172.
(*f*) Ss. 19, 24; [illegible] 172.
(*g*) R. v. F. S. P. xvii., 1063-1064; 176.
(*h*) These are contained in a circular of the same date addressed to the various public offices: London Gazette, 11th Feb., 1904.

special permission, until after the expiration of three months. (5) Armed ships of either belligerent were interdicted from carrying prizes made by them into British ports or waters. The Governor or other chief authority was required to notify and publish these rules in all British possessions beyond the seas (*j*). By further Orders issued on the 8th August, 1904, it was directed (1) that the hospitality usually accorded to belligerent warships in neutral ports should not be taken to extend so as to enable such vessels to use neutral ports for the purpose of hostile operations; (2) that the existing regulations as to supplies and coal must not, therefore, be understood as having any application to the case of a belligerent fleet proceeding either to the seat of war or to positions on the line of route, with the object of intercepting neutral vessels on suspicion of carrying contraband of war; (3) that such a fleet should not be permitted to make use of a British port in any way for the purpose of coaling, either directly from the shore or from colliers accompanying the fleet, and this whether the vessels of the fleet presented themselves at the port at the same time or successively; and (4) that the same restrictions were to be imposed on single belligerent vessels, if it was clear that they were proceeding for the purpose of belligerent operations as above defined; although (5) these rules were not to apply to vessels putting into port in distress (*k*).

Amongst the more notable decisions on the application of the Foreign Enlistment Act, 1870, are the following:—In the case of the *Gauntlet* (L. R. 4 P. C. 184) where a British tug had been employed by the French Consul at Dover to tow a German merchant vessel that had been taken as prize by the French, from English waters to Dunkirk roads—it was held by the Judicial Committee of the Privy Council (*l*) that such employment amounted to "a despatching of the ship with intent" within the meaning of sect. 8; and the tug was accordingly condemned as a forfeiture to the Crown. This serves to bring a mere auxiliary service within the scope of the Act; a point on which the British neutrality law appears to go beyond the requirements of international law (*m*). But, in the case of the *International* (L. R. 3 A. & E. 321)—where a British vessel during the same war was employed, under contract with the French Government, in laying down submarine cables between certain portions of the French coast—it was held that such an employment did not come within the provisions of the Act, even though the cables when laid might be used incidentally for military purposes, for the reason that the service was primarily of a commercial character, and that the mere possibility of a military use was not sufficient to invest

(*j*) See B. & F. S. P. vol. xcvii. (1903-1904), 484. The "Foreign Jurisdiction, Neutrality Order in Council" and the "British Protectorates Neutrality Order in Council" were both issued on the 21st Oct., 1904. See Parl. Papers (1905), Russia, No. 1, Cd. 2318.

(*k*) Reversing the decision of the Court of Admiralty.

(*l*) See Westlake, II. 193, 211, 232.

(*m*) See Parl. Papers (1905), Russia, No. 1, Cd. 2318.

it with a naval or military character within the meaning of the section. In *Reg.* v. *Sandoval and others* (56 L. T. 526), it was held that the offence of preparing a hostile expedition, under sect. 11 of the Act, was sufficiently constituted by the purchase by a foreigner then resident in England of arms and ammunition there, and by their shipment thence to a foreign port for the purpose of being put on board another vessel, also purchased in England, with the knowledge that both ship and crew were to be used in a hostile demonstration against a friendly State, even though the defendant took no part in any overt act of war, and even though the vessel was not fully equipped for the expedition within the British dominions (*n*).

(ii) THE UNITED STATES.

THE UNITED STATES *v.* QUINCY.

[1832: 6 Peters, 445; Scott, 706.]

Case. The defendant in this case was charged with an offence under sect. 3 of the Neutrality Act, 1818 (*m*). This provides, in effect, that if any person shall, within the limits of the United States, fit out and arm, or knowingly be concerned in the fitting out or arming of any ship, with intent that such ship shall be employed in the service of any foreign State, to cruise or commit hostilities against the subjects or property of any foreign State with which the United States are at peace, every person so offending shall be guilty of a misdemeanour and liable to fine and imprisonment. It appeared from the evidence that the defendant had superintended at Baltimore the making of certain repairs or alterations of a vessel called the "Bolivia": that this vessel had subsequently left Baltimore, having an equipment beyond that of a merchant vessel, and with some warlike stores on board: that she had then proceeded under his command, the owner being also on board, to St. Thomas, where the owner, having procured the necessary funds, equipped her as a privateer: and that she then assumed the flag of the United States of La Plata, and thereafter cruised and committed hostilities against the subjects and property of

(*n*) But counts under sect. 8 for equipping and despatching with intent failed. See also *Foster* v. *Pickersgill*, L. R. 2 Exch. 340, 348.

(*m*) Now s. 5283, Rev. Stat.

the Emperor of Brazil, with whom the United States were then at peace. The defendant, on returning to the United States, was prosecuted on the charge aforesaid. On the trial of the case before the Circuit Court, and after the close of the evidence, each party prayed for particular instructions to the jury on certain points of law. As the opinions of the judges differed, the case was referred for decision on those points to the Supreme Court.

Judgment. The judgment of the Supreme Court deals, first, with the question as to what would suffice to constitute "a fitting out and arming of the vessel in the United States" within the meaning of the statute. After referring to the contention put forward on behalf of the defendant that an acquittal should be directed if it were found that the vessel on leaving Baltimore and on her arrival at St. Thomas was not fully armed or in a condition to commit hostilities, the Court ruled that a fitting out or arming was one thing; that it was not necessary that the vessel should then be armed or in a condition to commit hostilities; and that the offence might be committed even though her outfit was not complete when she left the United States and even though the cruise did not commence until she were in port and further equipment took place at St. Thomas. Dealing, next, with the question of what would suffice to show a "intent to employ the vessel in the service of a foreign State," and specifically with the contention that an acquittal should be directed if it were found that when the vessel left the United States the owner had no fixed intention to employ her in such service, but only a wish so to do, the fulfilment of which would depend upon obtaining the requisite funds, the Supreme Court ruled that, in order to establish liability, "some overt act [must be] proved and presented as matter of contingent intention actually formed, directed forthwith with respect to the employment of the vessel [upon which she left the United States; one that could be found to have been known to the owner before the fitting out of the 'Bolivia' within the United States, with such an intention as aforesaid, since the offence would not be complete if, unless in the event that intent was frustrated by subsequent occurrences.

This case serves to mark a distinction which needs always to be taken count of; the distinction, that is, between the national and the international law of neutrality. For although, on the point first ruled on, the liability both of the State in international law, and of the individual under that particular municipal code, would appear to be governed by the same principle *(a)*, yet, on the second point, it is clear that no liability would be incurred by a State from a mere design on the part of individuals subject to its jurisdiction, which was not in fact carried into execution *(b)*.

Turning to the neutrality laws of the United States, we have already seen how the inadequacy of its common law powers in the situation in which the United States Government then found itself *(c)*, led to the passing of the Neutrality Act of 1794, which, although in the first instance temporary, was made permanent in 1800. This Act was directed more especially against the enlistment of men and the issue of foreign commissions in United States territory, the augmentation in force of the forces of foreign warships, and the preparation there of hostile expeditions against a friendly State, in violation of United States neutrality; and conferred extensive powers on the executive Government with a view to their prevention. Although now replaced by other legislation, the passing of this Act constitutes an epoch in the history of neutrality, for the reason that it not only set a higher standard of neutral duty than had hitherto prevailed, but virtually prepared the way for many of the now accepted rules as regards neutral duties in maritime war *(d)*. It was subsequently replaced by the Neutrality Act, 1818 *(e)*, which, like the British Foreign Enlistment Act, 1819, was rendered necessary by the circumstances of the wars which were then proceeding between Spain and Portugal and their respective American colonies. The more important provisions of this Act, a knowledge of which is essential to a proper appreciation of the American decisions, are in effect as follows *(f)*: 1. It makes it a criminal offence for any citizen to accept and exercise within the jurisdiction of the United States a commission to serve any foreign State *(g)* in war, against a State with which the United States are at peace. 2. It makes it a criminal offence for any person within the like jurisdiction to enlist or to procure any other person to enlist or to go abroad for the purpose of enlisting, in the service of any foreign State on board any vessel of war *(h)*. 3. It also makes it a criminal offence for any person within the limits of the United States

(a) See Wheaton, p. 239.

(b) See Wheaton, p. 180.

(c) See p. 375.

(d) The latter being provided by a temporary Act of 1817.

(e) 3 Stat. Law, Rev. Stat., p. 5281, 5291.

(f) The text of the enactment is given in Wheaton, p. 239, note.

(g) "Any foreign prince, State, colony, district, or people."

(h) It is, however, no offence to enlist in a vessel which is not owned wholly or in part by citizens of the United States or by persons owning property in this country, such vessel having been completely fitted out and commissioned before arrival in the United States (Rev. Stat., p. 5291).

(a) to fit out or arm, or to be knowingly concerned in fitting out or arming, any vessel with intent to employ her in the service of a foreign State to commit hostilities against a friendly State (*k*), or to issue a commission to such vessel with the like intent; or (b) to increase or augment the force of any vessel of war of any foreign State at war with a friendly State; or (c) to prepare any military expedition to proceed thence against a friendly State. (4) It also confers on the executive government exceptional powers with respect to the detention, restitution, or expulsion of vessels, in cases of delinquency; requires the owners of armed vessels owned in whole or part by citizens, and leaving the United States, to give security against their illegal employment, and authorizes the detention of such vessels by the local authorities in cases of suspicion; and finally empowers the President to employ either the land or sea forces in order to execute its provisions. This Act, although in some respects less precise in its terminology than the corresponding British Act, deals, it will be seen, with much the same classes of topics. Like the latter Act, it applies to aid given to unrecognized insurgents against a Government in amity with that of the United States (*l*), but not to aid given to the parent State against a revolting community whose belligerency has not been recognized by the United States (*m*). In the United States, as in Great Britain, it is usual on the outbreak of war between foreign States to issue a Proclamation of Neutrality (*n*).

The United States neutrality laws have been the subject of a great variety of decisions, some of which have already been referred to (*o*). Amongst others the following are especially noteworthy: In the *Santissima Trinidad* (7 Wheat. 283), a vessel previously employed as a privateer had been refitted in the United States and sent by her owners under the American flag to Buenos Ayres for sale as a commercial adventure; she was there sold to and subsequently commissioned as a vessel of war by the Buenos Ayres Government, in which character, and after recruiting men in a United States port, she took part in the capture of certain Spanish property; this the Court was now asked to restore, as having been taken in violation of the local neutrality. In these circumstances it was held (1) that there was nothing, either in the Neutrality Act or in the law of nations, which precluded United States citizens from selling armed vessels as well as munitions of war to foreign ports for sale, this being in the nature of a sale of contraband, which no State was bound to prohibit; but (2) that inasmuch as there had been a subsequent illegal augmentation of force within United States territory (*p*), this must be regarded as

(*k*) [illegible] p. 377, (*a*).

(*l*) *The Three Friends*, 166 U. S. 1.

(*m*) Opin. of U. S. A.-G. vol. xiii. 1869.

(*n*) For the terms of the proclamation issued on the 4th Feb. 1904, on or in anticipation of the Russo-Japanese war, see the Statutes at Large, 1903-1905, p. 2332.

(*o*) A summary of the judicial history of the subject down to 1866 will be found in Wheaton, Dana's n. 215; whilst the more important of the later cases will be found in Scott.

(*p*) In the shape of an enlistment

vitiating all captures made during that cruise, with the result that the proceeds of such captures found within the jurisdiction must be restored (*r*). In the *United States* v. *Trumbull* (48 Fed. Rep. 99; Scott, 731), it appeared that the defendant, during the civil war in Chile, had come to the United States and there made extensive purchases of arms and munitions of war on behalf of the Congressional party, and that the *Itata*, a Chilian vessel, then in the service of the party, had been despatched from Chile to fetch these, and subsequently took delivery of them within the territorial waters of the United States from a small vessel on which they had been shipped for that purpose by the defendant. On these facts the defendant was subsequently indicted for a violation of the neutrality laws, it being charged, amongst other things, that he had been concerned in the illegal fitting out of an armed vessel "with intent" (*s*), as also in an illegal augmentation of force (*t*), and in the preparation of a hostile expedition (*u*). It was, however, held in effect (*v*) (1) that the mere sending of a ship from Chile to the United States to take on board arms and ammunition purchased in that country and carry them back to Chile, did not constitute either a "fitting out and arming," or a "furnishing" of the vessel, or a "setting on foot of any military expedition," within the meaning of the sections in question, there being no law forbidding any person or Government from purchasing arms from the citizens of the United States and shipping them at the risk of the purchaser (*y*); and (2) that the fact that much secrecy and deception had been practised by those on board the *Itata*, and that she had finally quitted San Diego in violation of other provisions of the domestic law (*z*), did not suffice to bring the case within the purview of the statute under which the charge was laid (*a*). These occurrences also gave rise to a further controversy between the United States and Chile. On visiting San Diego, the *Itata* had been arrested on suspicion by the United States authorities, but had, whilst in the custody of the marshal of the Court and with that officer on board, made her escape, and, after landing him and shipping the arms and ammunition already referred to, had proceeded on her voyage to Chile. Thereupon she was pursued and arrested on the high seas by a United States warship, but eventually released. A claim for damages was subsequently preferred by the owners of the *Itata* against the United States Government on the ground that the seizure of the vessel outside the United States jurisdiction

of men, who, in default of proof, could not be presumed to be subjects of the State of the flag: s. c., p. 377; Scott, 701. See also *U. S.* v. *The Horsa*, Scott, 711. The bonds which are taken, under the neutrality laws, from armed vessels sailing from the United States and owned by United States citizens, are subject to the condition, that the vessels shall not be employed "by such owners" to cruise or commit hostilities against a friendly Power: Scott, 693.

(*r*) Under s. 5283, see p. 378, s. (*a*).

(*s*) Under s. 5285, see p. 378, s. (*c*).

(*t*) Under s. 5286, see p. 378, s. (*d*).

(*u*) Both in the District and Circuit Courts.

(*v*) See Opinions of U. S. Att.-Gen. xii. 452.

(*y*) *Infra*.

(*z*) Scott, 742.

was illegal. This was referred for determination to a Commission appointed under the United States and Chilian Claims Convention of 1892, with the result that an award was ultimately made in favour of the claimants (*e*).

General Notes. *The Relation of the National to the International Law of Neutrality.* As between States, the duties of neutrality, in strictness, depend upon and must be measured by international law. The local neutrality laws, apart from their bearing on internal order, merely represent the means provided by each State for enabling itself to fulfil its international duties. If, on the one hand, those laws fall short of international requirements, their insufficiency cannot be pleaded as an excuse for the non-discharge of an international duty. This was formally ruled by the Geneva Tribunal (*d*): and does not appear to be in any way qualified by the terms of the Hague Convention, No. 13 of 1907 (*e*). If, on the other hand, those laws impose obligations and restrictions in excess of international requirements, this fact cannot strictly extend the range or raise the standard of international duty as against the Power in question. Hence, in theory, a belligerent cannot treat their non-enforcement as cause of offence so long as international obligations are complied with. But in practice the relation between the two is somewhat more intimate. In the first place, in the department of neutrality even more than elsewhere, international standards have developed largely or mainly on the lines of the laws and practice of particular States (*f*). In the second place, having regard to the uncertainty and lack of uniformity that have hitherto characterized the customary law, it was only natural that an aggrieved belligerent should, in case of doubt and where the local neutrality law favoured his claim, appeal to that law as representing the neutral State's own estimate of its international obligations. Hence, from the point of view of policy, and apart from the question of internal order, it is probably unwise for a State to make or retain neutrality laws that are manifestly in excess of international requirements (*g*): although it must needs be admitted that if this had been generally the case in practice the law of neutrality would have failed to reach its present development. In the future, however, this difficulty is largely obviated by the greater certainty and definiteness which have now been imported into this branch of the law by Convention, and especially by the Hague Convention, No. 13 of 1907. This Convention, as we have seen, declares the minimum limits of neutral duty on a great variety of points which had hitherto been open to controversy, and it is probable that the Powers will have recourse to it with sooner or later both their

(*c*) See Moore, Int. Arb. iii. 3067; and also Chile, Digest, § 122.

(*d*) Art. 25; even though the duties [illegible] may be varied by treaty.

(*e*) See pp. 344, 351, 353, 359.

(*f*) See Hall, 608, n.

neutrality laws into conformity with it. At the same time, having regard to the fact that these Conventions strictly apply only between the signatories; that some States have either not accepted them or have accepted them under reservation of particular provisions; that they leave many points undealt with; and that some of their provisions are liable to be varied by municipal regulation *b*, it will be evident that national neutrality laws are still a matter of international concern; whilst on some subjects they are required to be internationally notified *c*.

Examples of Foreign Neutrality Laws. The practice of States as regards the enactment of local neutrality laws varies greatly. Some States, like Chile, issue neither proclamation nor regulations, whilst others, like Mexico, issue a general declaration but no regulations; preferring, in either case, to rely on the general principles of international law and on such provisions of the municipal code as may be applicable. Others, like Germany and Belgium, issue a proclamation or notice announcing the war, and enjoining in general terms the observance of neutral duties *d*. Others, like Brazil, possess permanent neutrality regulations which operate *ipso facto* on the outbreak of war *e*. Other States, like France, publish a declaration embodying neutrality regulations, although in no very great detail. So, on the 12th February, 1904, on the outbreak of the Russo-Japanese war, a declaration of neutrality was promulgated by the French Government repeating with some amendments the neutrality regulations that had been issued in April, 1898, on the outbreak of the Spanish-American war. These enjoin on all French subjects and residents the duty of abstaining from acts in contravention of neutrality; forbid illegal enlistment or the equipment or armament of vessels; adopt the rule of 24 hours' stay, except in cases of forced delay or justifiable necessity; forbid the sale of prize or booty in French waters; and announce that persons violating these regulations will forfeit their right to protection, and be liable in a proper case to be proceeded against under the laws of the Republic. Other States, again, like the Scandinavian States and Holland, issue a proclamation embodying neutrality regulations of a very detailed kind. Thus, the proclamation issued by the Netherlands Government on the 12th February, 1904, amongst other matters, (1) forbids, within the territory, all recruiting by or on behalf of either belligerent, and the furnishing of either belligerent with vessels of war, or with arms or munitions of war; (2) prohibits the equipping, or arming, or augmentation of force of any vessel

b See H. C., No. 13 of 1907, Arts. 11, 12, 19, 23.

c By article 27 of the Convention for the Pacific Settlement of International Disputes, a copy of the Neutrality Convention is to be communicated to the Contracting Powers by the Netherlands Government. Art. 27.

Sometimes attention is also directed to particular provisions of the municipal code that bear on the subject, as in the Belgian notice of the 12th Feb. 1904.

d The Brazilian Neutrality Edict of the 29th April, 1898, is in its general effect similar to the Orders issued by Great Britain, save that Art. 10 imposes a delay of seventy-two hours between the departure of a sailing vessel of one belligerent and a steamer of the other.

belonging to or intended for the service of either belligerent, the supply of such vessels with provisions or fuel without permission, and the sale of prizes or the holding of the same for the purposes of preservation; and (3) also directs attention to certain provisions of the civil and penal codes relating to these matters, and the liability incurred by persons engaging in the carriage of contraband or other acts which a belligerent is entitled to restrain. Special regulations were also issued with respect to the treatment of belligerent warships in the ports and waters of the Netherlands Indies. These limit the number of warships that may be present in port at the same time; adopt the "rule of 24 hours' stay," as well as that of "24 hours' interval"; forbid the entry of vessels accompanied by prizes except in cases of distress; limit the supply of provisions or fuel to an amount sufficient to carry a vessel to the nearest port of its own country, whilst denying such supply to a warship accompanied by prizes; require the abandonment of prizes as a condition of asylum; and forbid the sale or exchange of prize or booty (*l*).

RESTRAINTS ON NEUTRAL TRADE—THE DUTY OF ACQUIESCENCE.

THE "HELEN."

(1865: L. R. 1 A. & E. 1.)

Case. In this case the master of the ship "Helen" sued for wages under an agreement entered into between himself and the owners. The defendants by their answer alleged, *inter alia*, that the agreement was entered into for the purpose of running the blockade of the southern ports of the United States or one of them, and was therefore contrary to law and could not be recognized or enforced by the Court. On motion by the plaintiff, this part of the defendant's answer was ordered to be struck out, on the ground that trading with a blockaded port was not illegal, in the sense of being an offence under the municipal law, even though the law of nations in such case subjected the neutral property to liability to capture and condemnation.

Judgment. Dr. Lushington, in his judgment, observed that much turned on the sense in which the word "illegal" was used.

(*l*) A collection of these and other regulations will be found in U. S. 58th Congress, 3rd Session, 1904-1905, II, 1 *et seq.*, Diplomatic Documents (Foreign Relations).

Contracts for breach of blockade or for the carrying of contraband were, no doubt, illegal, in the sense that they exposed the parties to such penal consequences as were sanctioned by international law. But the illegality was one of a limited character. The relative situation of belligerents and neutrals was that a neutral country had a right to trade with all other countries in time of peace. Why should this right of the neutral be interrupted by war? To this the answer of a belligerent was that he must seize contraband and enforce blockade in order to carry on the war. In the result the respective rights of the parties were regulated by usage. In the case of blockade, if all necessary conditions were complied with, the belligerent was by the usage of nations allowed to capture and condemn neutral vessels which attempted to violate a blockade, without interference or remonstrance on the part of their Government. But it was no part of such usage that such voyages should be treated as illegal, or that a neutral State should be bound to prevent them. In English law the acts of British subjects in relation to belligerents could not be treated as offences except under the provisions of some statute. The Foreign Enlistment Act was itself a proof of this. And on this point there was no essential difference between breaking blockade and carrying contraband. So, according to the practice of all the principal States of Europe, the insurance of a contraband voyage was not an offence against municipal law. And the result of the American decisions was the same (*a*). Both principle, authority, and usage required the rejection of the doctrine that to carry on trade with a blockaded port is or ought to be a municipal offence by the law of nations.

In *Ex parte Charasse, Re Grazebrook* (34 L. J. N. S. Bank. 17), it was held that a contract of partnership in blockade-running and for the importation of contraband into the Confederate States was not illegal, in the sense of being contrary to municipal law. In his judgment, Lord Westbury observed that the right which the law of war gave to a belligerent did not produce the consequence that the act of a neutral in transporting munitions of war to a belligerent country was either a personal offence

(*a*) *The* [illegible] (1 [illegible]); *Maley* [illegible] *Co.* (6 Mass. 112; Wheat. at 340; [illegible] *v. The* [illegible] *v. Le* [illegible] 1 Johnson, at 5

against the belligerent captor, or an act which gave the latter any ground of complaint against the Government of which the former was a subject. All that international law did was to subject the neutral merchant to the risk of having his ship and cargo captured and condemned by the belligerent Power for whose enemy the contraband was destined *b*. It needs to be noticed, however, that in English law the non-disclosure of the real character of such a venture may amount to a breach of contractual duty, which, according to its nature, may either invalidate the agreement or found a claim for damages *c*.

GENERAL NOTES. *The Duty of Acquiescence* *d*. — In the conflict of interest which arose between the belligerent, who desired to destroy so far as possible his enemy's commerce, and neutral merchants, who claimed the right to continue their commerce without interference, a compromise was ultimately reached which, unlike most compromises, appears to rest on some formulation of principle. This is, that the neutral retains his right to carry on his trade as usual with either belligerent, whether in the way of selling to him, buying from him, or even carrying troops for his country, except in so far as such trade is directly forbidden, to prejudice or obstruct the operations of war or one party or to promote those of the other, in which case the belligerent whose interests are impugned will be entitled to restrain the acts in question and to confiscate the property involved. At the same time, this principle does not, as we shall see, cover the entire ground of the conflicting claims between belligerents and neutrals in the matter of restraints on inland trade *e*, while there is a wide divergence of opinion and practice as to the precise conditions under which such belligerent rights may be validly enforced *f*. Nevertheless it is now almost universally recognized *g* that the enforcement of these restrictions devolves on the belligerents themselves, each being invested for this purpose with a right of visit and search over neutral vessels and their cargoes, and a consequent right of detention in cases of suspicion and of confiscation in cases of guilt *h*; that the neutral State itself is not thereby placed under any obligation to enforce these restraints on its subjects, or to punish their violation, under its municipal law, its duty being merely a negative duty of acquiescence in an interference by the belligerents with its subjects and their property that would not otherwise be permissible *h*; and that an infringement of these

a See ... v. *L* ... 1 Johnson N. Y. ... Cas. 1 ...
b *The* ... N. S. ... 5 C. Rob. 2 ... p. 315 ...
c ... 1856, ...
d ... 1856, ...
e Although a neutral merchant will ... master's authority to ... elevation of London ... 3 Term ... law.
f ... p. 254.
g *The Hoop*, 1 C. Rob. ... *The Rose*, 2 C. Rob. ... 1897, 2 Q. B. 135, ... p. 146, ...

belligerent rights by neutral subjects is not "illegal," in the sense of being criminal, or indeed attended by any penal consequences save those involved in the possible capture and condemnation of the property.

Restraints on Neutral Trade: (1.) *Under the Customary Law.* The more important restrictions on neutral trade that came to be established under the customary law although with some variation as to their extent and mode of application were these: (1) It was recognized from a comparatively early period that neutrals must not carry on their trade with ports or places in the territory of one belligerent, communication with which had been interdicted by the other; this forming the subject of the "law of blockade." Under the earlier law this was probably confined to places with which the belligerent had cut off communication, in the course of some specific operation of war and in pursuance of an immediate military end (*k*). But by virtue of a more recent practice, commonly known as "commercial blockade," belligerents have assumed the right to interdict neutral traffic, not merely with places that are blockaded in aid of some specific operation of war, but also with extended areas, covering at times the entire sea-board of the enemy, with the object of striking at his commerce and weakening his resources. This new departure in maritime war although strictly in derogation of the principle on which belligerent restraints on neutral trade were originally based has now become sufficiently established in practice and by general acquiescence (*l*) to warrant its being treated as a permissible measure; and, being in fact highly efficacious as a means of bringing pressure to bear on the enemy, it is scarcely likely to be abandoned (*l*). (2.) It was equally well recognized that neutrals might not carry to an enemy articles calculated to aid him in his warlike operations; this forming the subject of the "law of contraband." (3.) Subsequently, moreover, the liability of the neutral, both in relation to contraband and blockade, was, as we shall see, considerably extended by the "doctrine of continuous voyage" (*m*). (4.) It also came to be recognized that neutrals might not render to a belligerent certain services calculated to aid him in war, such as the carriage of his troops or despatches; this forming the subject of what is now called the "law of unneutral service." (5.) Under the earlier law, restrictions were also imposed on the carriage of neutral property in enemy ships, and of enemy property in neutral ships, even though such property was otherwise innocent in its character and destination. But different States here acted on different principles, with much resulting confusion, which ultimately led to the regulation of this matter by Convention (*n*). (6.) Finally,

(*k*) Although this was not always observed in practice, as, for example, during the Napoleonic wars, see p. 188, *n*, *supra*.

(*l*) Subject, of course, to the condition of the blockade being effective: see p. 405, *infra*.

Le Louis, p. 463; Hall, 628; but see also p. 137, *supra*.

(*m*) *Infra*, p. 467.

(*n*) *Infra*, p. 392.

under a practice which is commonly known as "the rule of the war of 1756" (*a*), some belligerents claimed a right to prohibit the carrying on by neutrals in time of war of a trade closed to them in time of peace (*b*); a practice which is, as we shall see, admissible in principle (*c*), and which is still followed by some States, although questioned by others (*d*). In this way there emerged a large body of customary rules and observances in relation to belligerent rights over neutral trade, which, although fairly well ascertained as regards their general character and tenour, were yet greatly lacking both in certainty and uniformity as regards their precise limits and mode of application.

ii *As Modified by Convention.* On many points, however, this want of certainty and uniformity has now been corrected by Convention. The Declaration of Paris, 1856, in addition to abolishing privateering, which was perhaps the most noxious feature of the earlier system, and prohibiting of "paper blockades," also narrowed the scope of belligerent interference with neutral trade by exempting from capture both enemy goods in neutral ships and neutral goods in enemy ships, so long as they were not of a contraband character (*e*). But this still left a great variety of topics, some of them of the first importance, on which the practice of States continued to be divergent or contradictory. The commercial inconvenience and the danger of international complications which arose from this conflict of practice, were, moreover, greatly intensified by modern trade conditions: a fact forcibly exemplified by the events of the Russo-Japanese war. It was with a view to the removal of this danger and inconvenience, as well as with the object of preparing the way for the establishment of an International Prize Court, that the Naval Conference of 1908-9 was summoned (*f*), and the resulting Declaration of London drawn up. This Declaration deals with the subjects of blockade, contraband, and incidentally the application thereto of the doctrine of continuous voyages, as also with unneutral service, the question of the destination of neutral prizes, the question of convoy, the effect of resistance to search, and the question of compensation to neutrals (*g*). On these matters it prescribes uniform rules, which are declared to correspond in substance with the generally recognised principles of international law (*h*). These rules will be considered hereafter, in connection with the particular topics to which they relate. Nevertheless, the Declaration leaves, as we have seen, many questions untouched and some problems unsolved, including such matters as the true test of enemy character in mari-

(*a*) [illegible] p. 63.
(*b*) [illegible] p. 154.
(*c*) [illegible] 20, 185.
(*d*) See Perels, [illegible]
(*e*) [illegible] p. 185-6.

time war (*yy*), the legality of the conversion and reconversion of merchant ships into warships on the high seas (*zz*) and the right of neutrals to engage in a trade closed to them in time of peace (*zz*).

(iii.) *The Authority of the Declaration of London.* The Declaration of London will, of course, be binding on such Powers as may finally ratify it: and will then carry a joint obligation on the part of all the States that accept it to ensure the mutual observance of its rules in any war in which all the belligerents are parties to it: as well as a several obligation on the part of each to adopt all necessary measures for securing its due enforcement within its own jurisdiction (*aaa*). Its rules will also be applied by the International Prize Court, if and when that Court is established (*b*). It is probable, moreover, that the Declaration, if widely accepted, will sooner or later become binding also on non-signatory Powers, as representing the predominant practice of States (*c*). Finally, even if it should remain unratified, the Declaration will, it is conceived, exercise a profound influence on future practice; for the reason that it embodies those rules which the representatives of the leading maritime States considered to be best suited to modern conditions, having regard to the existing divergences of practice and the respective interests of belligerents and neutrals. Hence, so far as its provisions extend, it is probable that belligerents who act under it will commonly be deemed to be justified in doing so; whilst it is, at any rate, doubtful whether—in view of the increased sensibility of neutral trade to the restrictions imposed by war, and the general increase of naval strength—a non-adhering belligerent, however powerful, would venture to challenge that combined resistance which a reversion to the older methods (*d*) might conceivably provoke.

THE CARRIAGE OF

NEUTRAL GOODS IN ENEMY SHIPS.

THE "FORTUNA."

1802. 4 C. Rob. 278. Prize Cases Decided in Sir W. Scott's Time, 1811.

Case. During a war between Great Britain and the United States, the "Fortuna," an American vessel, laden with a cargo of corn

(*aaa*) Art. 65.
(*b*) Art. 66.
(*c*) [illegible]
(*d*) [illegible]

for Lisbon, was captured by the British, and brought in for adjudication. The ship was condemned as being enemy property; but the cargo, being neutral property, was restored, and was subsequently forwarded to Lisbon, its original destination, and there delivered to the consignee. The case now came before the Court upon an application by the captors for freight, security having been previously given to abide the decision of the Court on this point. In the circumstances it was held that the captors were entitled to freight.

Judgment. Sir W. Scott, in giving judgment, said that in such a case he apprehended the rule to be that a captor was entitled to freight, just as he would not be entitled to it if he did not proceed and perform the original voyage. The specific contract was performed in the one case and not performed in the other. The true rule was that a captor who had performed the contract of the vessel was entitled to freight as a matter of right; although if he had done anything to the injury of the property, or had been guilty of any misconduct, he would remain answerable for the effect of such misconduct or injury, in the way of set-off against his claim. In the present case, however, the captors had done nothing to forfeit their right, and freight to them must accordingly be decreed.

It was assumed in the judgment that the goods, being neutral property and of an innocent character, were restorable. The case therefore serves to illustrate the general rule, which was acted on by Great Britain even prior to the Declaration of Paris, that neutral goods, not being contraband, found on board an enemy vessel are exempt from condemnation; as well as the ancillary rule, to which the decision is more particularly directed, that if in such a case the captor forwards the goods to their destination he will be entitled to freight (*a*), subject to any set-off that the neutral owner may have for loss or damage arising out of the captor's misconduct (*b*). Where freight is decreed, the Court will if necessary order the sale of a sufficient portion of the cargo to satisfy the claim. The immunity of neutral goods of an innocent character found on enemy vessels taken as prize being now established by the Declaration of

(*a*) As to various applications of this rule, see *The Two Sisters*, Carburton (6 C. Rob. 269); *The Lucien* (Edw. 56); *The Diana* (5 C. Rob. 67), where it was applied to the goods of subjects of the captor State in circumstances freeing them from the taint of illegal trade; and *The Two Sisters* (1 Gall 274).

(*b*) *The Lucien* (4 C. Rob. 278).

Paris, 1856 (*d*), the right of the captor to freight, on forwarding goods to their destination, would appear to be still applicable.

The immunity of neutral goods in enemy vessels will not, in general, be affected by the fact of the vessel herself having resisted capture (*e*). But, according to the doctrine of the British Prize Courts, it will be forfeited if the goods were shipped on board an armed vessel of the enemy, for the reason that this is regarded as evidence of hostile association and intention to resist visit and search (*f*). On this question, however, the United States Courts take a different view; holding that a neutral owner may lawfully employ a belligerent armed vessel to transport his goods, and that the goods will not lose their neutral character by reason of either the armament or the resistance of the vessel, so long as the neutral himself does not directly participate therein (*g*).

From the point of view of the French Courts, neutral goods embarked on enemy vessels are also subject to the risk of loss in the case where such ships are destroyed. So, in the case of the *Norwaertsche* where it appeared that a German vessel having neutral goods on board had been captured by the French and destroyed together with her cargo—an application for compensation by the English owners of the cargo, on the plea that neutral goods were protected by the Declaration of Paris, was refused; this decision being based on the view that although the Declaration recognized the immunity of such goods from confiscation, it did not by any means import that an indemnity could be demanded for injury or loss sustained by a legal capture or by any acts of war that accompanied or followed it (*i*). And this interpretation of the law would appear to be correct, provided that the captor can show that the act of destruction was justified by military necessity. But where neutral goods of an innocent character are found on board a neutral vessel and both ship and cargo are destroyed by a captor, then the owner of the goods will be entitled to indemnity, even though the act of destruction proves to have been justifiable (*k*).

(*d*) Art. 3.

(*e*) See *The Cosmopolite*, 5 C. Rob. 232.

(*f*) *The Ringende*, 1 Dods. 143.

(*g*) See *The Nereide*, 9 Cranch, 388. Story, J., indeed, dissented; but in *The Ariadne* (3 Wheat. 109) the decision in *The Nereide* was confirmed.

(*h*) Dalloz, 1872 iii. 94.

(*i*) A similar judgment was given in the case of *The Ludwig*: see Hall, 719; and p. 394, *infra*.

(*k*) See the Declaration of London, 1909, Art. 53; and, as to the question of the permissibility of the destruction of neutral vessels, p. 486, *infra*.

(ii) ENEMY GOODS IN NEUTRAL SHIPS.

DARBY *v.* THE BRIG "ERSTERN."

[1782: 2 Dallas, 34.]

Case. In 1782, during war between Great Britain on the one hand, and France and the United States on the other, the island of Dominica, which then belonged to Great Britain, capitulated to the enemy. By the terms of the capitulation all commercial intercourse with Great Britain was prohibited. Subsequently certain British subjects attempted to evade the prohibition by carrying on a trade through the medium of a neutral port and the neutral flag. In the present case it appeared that the "Erstern," a neutral ship, had cleared from London, with a cargo belonging to British owners, ostensibly for Ostend; and that after arriving at Ostend she had cleared with the same cargo, now purporting however to have been transferred to neutral owners, for Dominica. On her voyage thither she was captured by a United States cruiser, and was brought in for adjudication, on the ground of having intended a violation of the capitulation. The United States had in 1780 adopted the principle of "free ships, free goods"; and had by an ordinance of Congress exempted from capture all neutral vessels, except such as were employed in carrying contraband and the like to the enemy. In the Court below both ship and cargo were acquitted; the neutral flag being deemed, by virtue of the ordinance in question, to cover enemy goods. But, on appeal, both ship and cargo were condemned, on the ground that even though the neutral flag might cover enemy goods, it would not suffice to protect either vessel or cargo against the results of unneutral conduct such as that disclosed.

Judgment. In giving judgment, the Court stated that, according to the evidence, it appeared that the ship was neutral and the cargo enemy property. Dealing with the objection that the ship, being neutral, could not properly be taken as prize, it was pointed out that if the owners of a neutral ship violated their neutrality by taking a decided part with the enemy, the ship would then be in the predicament of enemy property, and

subject to seizure and confiscation. In the present case the facts showed that the owners of the ship had entered into combination with the owners of the cargo, and had by the use of false and colourable papers taken on themselves the ownership of the cargo, and clothed it with the garb of neutrality, in order to screen it from detention and capture. The offence did not lie merely in attributing to enemy property a neutral character, for such property, unless contraband, was already sufficiently protected by the neutral flag, but in attempting by fraudulent combination to re-establish British commerce with Dominica, in derogation of rights acquired in war by the other belligerents. Dealing with the contention that the cargo could not be taken as prize by reason of the ordinance of Congress that enemy property, not being contraband, found on neutral ships was protected, it was pointed out that if the ship had been employed in fair commerce, her cargo, although the property of an enemy, would not have been prize, because it had been provided by Congress that the rights of neutrality should extend protection to the goods and effects of an enemy. But Congress had not provided that a violated neutrality should afford such protection; nor could it indeed have done so without confounding all distinctions between right and wrong.

The immunity of enemy goods, not being contraband, found on neutral ships, was adopted by the United States in 1780 (*a*). It was held, however, by the Federal Court of Appeals that, even though the neutral flag might cover enemy goods, it would not protect either ships or goods found to be engaged in a trade carried on in fraudulent association with the enemy and in derogation of rights secured in war by the other belligerent. The general immunity of enemy goods found on neutral vessels was subsequently established as between the signatories by the Declaration of Paris, 1856 (*b*), and is now universally accepted in practice. It would, however, still be subject to the exception set up in the case of *Dalby* v. *The Esperia*, that enemy goods on neutral ships will not be protected where the neutral flag is used to cover an illicit trade of the kind there described (*c*).

GENERAL NOTES.—*The Carriage of Neutral Goods on Enemy Ships, and Enemy Goods on Neutral Ships*: (i.) *The Earlier Usage*. The

(*a*) Although not as a permanent [illegible] For an analogous case, see *Case*, rule, p. 165.
Art. 2.

question of the liability of neutral goods found on enemy ships and of enemy goods found on neutral ships, was formerly the subject of two strongly contrasted principles, which were followed by different States or groups of States. (1) According to one principle, the liability of property to capture was determined by the neutral or enemy character of its owner, and not by that of the vessel in which it was carried. On this view, the goods of a friend, not being contraband, were free if found in an enemy vessel, whilst the goods of an enemy were liable if found in that of a friend. The pressure of this rule on neutrals, however, was alleviated in practice by certain ancillary rules, under which a captor who took enemy goods on a neutral ship was required, on their condemnation, to pay freight to the neutral carrier, capture being deemed equivalent to delivery, except where this right had been forfeited by unneutral conduct (*d*); whilst, in the converse case, a captor who took an enemy ship with neutral goods on board was given an inducement to forward the goods to their destination by a recognition of his right to freight if he did so (*e*). This was the principle usually acted on by Great Britain, and also by the United States except where qualified by treaty (*f*). (2) According to the other principle, the liability of the property in either case was held to depend on the nationality of the vessel in which such goods were carried, this being in general determined by her flag. On this view, enemy goods, not being contraband, found on neutral vessels went free, whilst neutral goods found on enemy ships were treated as hostile; this being commonly expressed in the maxims "free ships, free goods," and "hostile ships, hostile goods." This principle was for the most part followed by countries such as France, Holland, and Spain, and was also favoured by neutrals generally as tending to increase their maritime traffic. In view of the compromise which was ultimately reached on this subject, and which is now universally accepted, it is needless to trace the subsequent history of these rival principles, beyond remarking that their operation in practice was greatly qualified by treaties which were made from time to time between particular States, and that such treaties were often made with little regard to uniformity or consistency (*g*). Hence no general custom emerged, and the practice on the subject was chaotic and confused (*h*). Such was the condition

(*d*) *The Bermuda Hagge* (1 C. Rob. 90).

(*e*) *The Fortuna* (1 C. Rob. 78; this operating in the neutral interest, by securing in general the due delivery of the goods).

(*f*) *See The Nereide* (9 Cranch, 388; Scott, 884).

(*g*) Thus States which ordinarily followed the criterion of ownership often adopted by treaty the criterion of the flag, either wholly or in part; whilst States which ordinarily followed the criterion of the flag sometimes adopted that of ownership. "Free ships, free goods" was, moreover, sometimes adopted in conjunction with its corollary, "hostile ships, hostile goods"; but at other times separated from it. Not infrequently, too, we find the same State making with other States treaties of an opposite character.

(*h*) See Hall, 686 *et seq.*, 715 *et seq.*; Westlake, ii. 124 *et seq.*; Wheaton (Boyd), 598; *The Cygnet* (2 Dods. 299); and *The Nereide* (9 Cranch, 388, 631).

of things when, on the outbreak of the Crimean war, in 1854, Great Britain and France, being allies, found it necessary to adopt common rules with respect to maritime capture. A compromise was thereupon arrived at, under which Great Britain waived her right of seizing enemy goods in neutral ships, but without qualifying the previous immunity under her rule of neutral goods in enemy ships; whilst France accepted the immunity of neutral goods in enemy ships, but without qualifying the previous immunity under her rule of enemy goods in neutral ships; and these principles were accordingly applied throughout the war by the Prize Courts of both countries.

(ii.) *The Declaration of Paris*, 1856. At the close of the war, this settlement of a long-standing controversy was accepted by the other parties to the Treaty of Paris (*k*), and was finally embodied, together with certain other principles of maritime law, in the Declaration of Paris, 1856. This provides (1) that the neutral flag shall cover enemy goods with the exception of contraband of war (*l*); and (2) that neutral goods, with the exception of contraband of war, shall not be liable to seizure under the enemy flag (*l*); thus adopting "free ships, free goods" without its corollary "hostile ships, hostile goods." The Declaration, although originally binding only on the signatories (*m*) who were also parties to the Treaty of Paris, had up to 1907 been acceded to by all Powers with the exception of the United States, Spain, Mexico, Venezuela, Bolivia and Uruguay (*o*); whilst during the war of 1898 both Spain and the United States conformed to its provisions. At the Hague Conference of 1907, moreover, the delegates both of Spain and Mexico declared that their Governments adhered to the Declaration in its entirety (*p*); with the result that its principles may now be regarded as of general obligation.

Questions that may arise under the existing Law. With respect to enemy goods in neutral vessels, the rule laid down by the Declaration of Paris would, it is conceived, still be subject to the exception laid down in the case of *Darby* v. *The Erstern* (*q*). Nor can the owner of enemy goods laden on a neutral vessel claim compensation for their loss in the event of the vessel being destroyed by a belligerent, unless indeed the destruction proves to have been unjustifiable (*r*). With respect to neutral goods on enemy vessels, these remain subject to any loss or damage that may be caused by the capture of the vessel or the interruption of the transport of the goods. If the vessel is brought in for adjudication, the neutral

(*k*) See vol. i. 10.

(*l*) Art. 2.

(*m*) Art. 3.

(*n*) No right of denunciation is reserved.

(*o*) Pearce Higgins, 3.

(*p*) *Ibid.*

(*q*) See p. 391.

(*r*) In which case the owner would, it is conceived, be entitled to be placed in the same position, so far as possible, as if the illegal act had not been committed: see the Declaration of London, Art. 52; and, as to the question of the destruction of neutral prizes, p. 486, *infra*.

owner is entitled to a restitution of the goods, or to their proceeds if sold; whilst if the captor chooses to forward them to their destination, he would, it is conceived, be entitled to freight (*s*). In the case where an enemy vessel is destroyed, it still remains to see whether the Prize Courts of other countries, or the International Prize Court if it should be established, will follow the decision of the French Courts in the cases of the *Norwaerts* and the *Ludwig* (*t*). In principle it would seem that, whilst a neutral owner who sends his goods by enemy vessels must take the risk of all necessary acts of war, it will be incumbent on a captor who destroys an enemy vessel to show that the act of destruction, in consequence of which goods that would otherwise have been restorable to the neutral owner became lost to him, was one strictly required by military necessity. Otherwise, it would be open to a belligerent who chose to adopt a general policy of destruction, as regards enemy prizes, to render the provisions of the Declaration of Paris on this subject virtually nugatory (*u*).

BLOCKADE.

(i) GOVERNING PRINCIPLES.

THE "FRANCISKA."

[1854-5; Spinks, 111; 10 Moo. P. C. 37.]

Case. On the 22nd May, 1854, during war between Great Britain and Russia, the "Franciska," a Danish vessel, was captured by H.M.S. "Cruiser," off Lyser Ort, and sent in for adjudication on a charge of having attempted to break the blockade of Riga. On behalf of the owner it was contended that the ship was under orders to proceed to Riga only in the event of that port not being under blockade: that the master had made enquiries, although without result, both at Copenhagen, where he had touched on the 11th May, and on the coast; and that he had finally approached the 'Cruiser" with the like object. In the Court of Admiralty (*a*) a very lengthy and exhaustive judgment was delivered, covering incidentally nearly the whole domain of the law of blockade. In the result both ship and freight were

(*s*) *Supra*, p. 389.
(*t*) *Ibid.*
(*u*) See Hall, 720.
(*a*) The case being only one of a class of eight, all of which were heard before judgment was given.

condemned, on the ground that the blockade was notorious at the time when the vessel sailed from her last port and that the master having thus acquired notice of the blockade had in fact intended to violate it. On appeal to the Privy Council, however, this decree was reversed and restitution granted, although without costs, on the ground that the blockade, even though otherwise legal, had been rendered invalid by certain relaxations which had been granted to belligerent merchant vessels to the exclusion of neutrals; and, further, that the only notice by which the master was affected was a notice which went beyond the actual facts, and which was not therefore binding on neutrals. But save on these points the judgment does not appear to impugn the principles laid down in judgment of the Court of Admiralty, which may still be regarded as authoritative.

Judgment of the Court of Admiralty. In the Court below, Dr. Lushington stated at the outset that his judgment would be based on the general principles previously laid down by Lord Stowell, for the reason, amongst others, that those principles had been recognized as a part of the law of nations by the celebrated jurists of the United States; and also that he proposed in the first place to deal with those general questions in relation to blockade which affected the whole class of cases then before him (*b*).

The first question, then, was whether the British admiral in the Baltic had authority to establish blockades, which was a high act of sovereignty (*c*). Such an authority did not belong to a naval commander in his own right, but must be committed to him by his Government; although in the case of distant service such authority might be implied, whilst in any case the adoption of a blockade by the Government would have the effect of legitimating it, at any rate as regards subjects of other countries (*d*). In the case before the Court there was conclusive evidence both of prior authority and subsequent adoption.

The next question was whether the force employed to stab-

(*b*) *Supra*, n. (*a*). The judgment is very lengthy, extending over some fifty pages, and only its general effect is given in the text.

(*c*) *The Hoop* (1 C. Rob. 196).

(*d*) *The Rolla* (6 C. Rob. 364).

lish the blockade was adequate: that being a question distinct from its due maintenance. To be adequate the place under blockade must be watched by a force sufficient to render egress or ingress dangerous: in other words, save under peculiar circumstances, the force must be sufficient to render the capture of vessels attempting to go in or come out most probable. On this point the testimony of the Commander-in-Chief was material: if uncontradicted it might be conclusive; whilst if contradicted a conclusion must be drawn from a consideration of the whole of the circumstances. In the present case there was no reason to suppose that a force of three or four steam vessels was not adequate to blockade the coast from Libau to Lyser Ort, a distance of less than one hundred miles. The next question was whether the port of Riga could be legally blockaded from Lyser Ort at a distance of 120 miles. As to this the evidence showed it to be perfectly practicable for a vessel of war stationed near Lyser Ort, at the entrance of the gulf, with a base of only three miles, to prevent the ingress and egress of vessels into and from the gulf, and consequently to and from all places within it. The legality of a blockade was not affected by reason of the blockading force being stationed at a considerable distance from the place blockaded; the true criterion of its legality being not one of place or distance, but the capacity of the force wherever maintained to cut off all communication with the place blockaded [*a*]. Both in principle and on authority, moreover, it was requisite to the validity of a blockade that the ports blockaded should be hostile territory. But in the present case all these conditions had been complied with.

The next question was whether the blockade was maintained with the necessary strictness. As to this, if the force deputed was competent some presumption fairly followed that the officers discharged their duty. In the present case the evidence both as regards the warships employed and the merchant vessels searched, and the evidence of the admiral himself, tended to show this. As against this it was alleged that many vessels were allowed to

[*a*] Wheaton, Com., 1 Dig. Ann. ed. v. *Arnaldo*, 1 Moo. & M. 247, where it was held that a blockade of Buenos Ayres was well maintained at a distance of 100 miles.

go in and come out by consent. When a blockade had been established by notification, or even *de facto* for so long a time that all neutral nations must be taken to be aware of it, it was not legally competent to the blockading force to allow ingress or egress at their pleasure. But when a blockade *de facto* had been recently established, then, as regards egress, it was the privilege of a neutral trader to come out with cargo laden before blockade, the blockading officers having to form their judgment on this as best they could; whilst neutral vessels in ballast might of course come out. As regards ingress, to allow a vessel to enter would be a breach of duty, but it did not follow that every vessel seeking to enter must be detained. On the contrary, if there was reasonable ground for believing her ignorant of the blockade, she must be merely notified or warned; even though it sometimes happened that such vessels subsequently succeeded in slipping through. In the present case there was no evidence of ships being allowed to go in or come out by permission. There was indeed evidence that a certain number of vessels succeeded in entering despite the blockade; but maintenance of a blockade was always a question of degree; and in no case had a blockade been held to be void, so long as the blockading force was competent and present, merely because a certain number of vessels succeeded in evading it. No port could be hermetically sealed.

With respect to the question whether the blockade was binding before the date at which it was published in the Gazette, up to the time of such publication it was a blockade *de facto*; and, as such, it depended on its own legality and was subject to all rules that attached to a blockade *de facto* as distinguished from a blockade by notification. No doubt it was convenient that every blockade *de facto* should be notified as soon as possible by the Home Government; and it then became a blockade by notification, with all its attendant advantages. But under the British practice notification was not essential, and was indeed sometimes omitted altogether [*f*]. If that were so, then a blockade *de facto* could certainly not be invalidated retrospectively by any delay in notification, if it was subsequently notified.

[*f*] *The Two Judith*, 1 C. Rob. 150.

With respect to the contention that the blockade was vitiated by the Orders in Council in conceding privileges to belligerent vessels as regards trade with the ports blockaded from which neutrals were excluded, the learned judge, after a careful consideration of the nature and the effect of these orders as regards neutrals, and a full recognition of the principle that a belligerent is not entitled to take for himself or concede to the other belligerent rights of trade prohibited to neutrals, concluded that the effect of the relaxation in question, being only partial, was not such as to invalidate the blockade, but only to confer on neutrals a right to similar treatment (*g*).

With respect to the question of notice, knowledge on the part of the neutral was an indispensable requisite of liability. In the case of blockade by notification notice of the blockade was communicated by the belligerent Government to foreign Governments either through their representatives accredited to it, or through its own representatives abroad accredited to them; and any ignorance for which the neutral Government was responsible would be no excuse (*h*). In the case of blockades *de facto*, individual warning to any vessel about to enter must in general be given. But by lapse of time and other circumstances a blockade *de facto* might become so notorious that a knowledge of it might be generally presumed, either as a *præsumptio juris et de jure* or as throwing the onus of proof on the claimant. After examining the factors necessary to constitute notoriety and the evidence of this which had been actually adduced, the learned judge concluded that the blockade in question was at any rate of such notoriety as to throw on the neutral the onus of proving his ignorance of a measure that had become so widely known (*i*). In the light of these principles, and on the grounds that the evidence went to show that the blockade was notorious at the time when the vessel had left her last port of call, that the master had made a false declaration of position, and that he was in fact proceeding

(*g*) The learned judge's [illegible] was [illegible] Convention of [illegible] on [illegible] indication of the latter: see p. 140, *infra*.

(*h*) See p. 145.

(*i*) The question of the effect of a treaty of 1670 made between Great Britain and Denmark, in which each party undertook to deal with the enemies of the other, was also discussed: see p. 152 *et seq.*

to violate the blockade with full knowledge thereof, a decree of condemnation must be pronounced.

Judgment of the Privy Council. In the judgment of the Judicial Committee, which was delivered by the Rt. Hon. T. Pemberton Leigh, it was pointed out that the questions for decision were: (1) whether the port of Riga was on the 14th May, the date at which the vessel left Copenhagen and after which there was no proof of any further notice—legally in a state of blockade; and (2) if so, whether the master or owner had such notice of the blockade as to subject the vessel to condemnation.

With respect to the existence of a legal blockade, it appeared that the British admiral had on the 15th or 17th April established, by a competent force properly stationed for the purpose, an effective blockade of the ports of Libau, Windau, and Riga, and that this blockade was subsisting at the time of seizure. On the question of authority it must be presumed that the admiral had authority from his Government to institute such a blockade of the Russian ports as he might deem desirable.

It appeared, however, that on the 15th of April the British Government had issued an Order in Council, which in effect permitted Russian vessels sailing before the 15th May from any Russian port in the Baltic for any British port to proceed with their cargoes on such a destination; that the French Government had granted a similar permission as regards Russian vessels sailing for French ports; and that the Russian Government had also conceded to British and French vessels in Russian ports six weeks within which to load and depart for foreign ports. As regards egress from the blockaded ports, therefore, the effect of these ordinances was virtually to remove, up to the date mentioned, all restrictions on the conveyance of cargoes in Russian vessels to British and French ports; and, although British and French vessels would strictly remain liable for sailing from blockaded Russian ports after notice of blockade, it was impossible that the allied Powers intended to deprive their subjects of the indulgence granted to them by the Russian Government. The practical effect, therefore, was

to allow the belligerents to carry on a commerce from which neutrals were excluded: and the question was whether such an exclusion was warranted by the law of nations, and, if not, to what extent neutrals could avail themselves of the objection. As to this, it had been laid down by the learned judge in the Court below that such an exclusion was not justifiable, for the reason that a belligerent was not at liberty to reserve to himself or to concede to the other belligerent a right of carrying on commercial intercourse that was denied to neutral nations: that it was military need alone which justified restraints on neutral trade: and that if the belligerents themselves engaged in a trade that was otherwise prohibited it was clear that no such need existed. And with this principle the Judicial Committee entirely concurred. On the question, however, as to how far such licenses would invalidate a blockade, the same learned judge had held that the effect of a relaxation which was only partial but which at the same time exceeded the limits of some special occasion, was not to invalidate the blockade, but to entitle neutrals to the benefit of similar treatment. In order to test this conclusion it was necessary to remember that the right of blockade was not founded on any general unlimited right to cripple the enemy's commerce with neutrals. On the contrary, it was admitted on all hands that a neutral had a right to carry on with either belligerent during war all the trade that was open to him in time of peace, subject only to the exception of trade in contraband goods and with blockaded ports; both these exceptions being founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent. It was an acknowledged rule that the object of blockade was to cut off all communication with the blockaded place whether for egress or ingress (*j*). The Court could not therefore assent to the proposition that any objection on the ground of relaxations by the belligerent in his own favour would be removed if the Court of Admiralty allowed the same indulgence to neutrals; for such relaxations, if applied to neutrals on the same terms, might

(*j*) *The Frederick Molke*, 1 C. Rob. 86; *The Betsey*, 1 C. Rob. 93; *The Emanuel Jacobi*, 1 C. Rob. 150; *The Rolla*, 6 C. Rob. 364; 4 Rob. 86; *The Success* (1 Dods. 131).

prove of very little value, whilst if construed more favourably they would amount to a general freedom of commerce which was inconsistent with the existence of any blockade. The ambiguity, in which all these questions were left by the Order in Council, moreover, was another strong argument against the validity of the blockade: for if only a partial modified blockade was to be enforced against neutrals, then justice required that such modifications should be notified to neutral States, in order that they might be fully apprised as to what acts their subjects might and might not do. If these views were correct it followed that at the time this vessel sailed for Riga she could not be affected with notice of the blockade, for the reason that there was no legal blockade in existence, and a neutral could not be required to speculate as to the subsequent establishment of a blockade *de facto*.

As regards ingress into the blockaded ports, certain relaxations had also been set up by the Order in Council of the 29th March in favour of Russian vessels then in or on their way to British ports, which were to be permitted to return to their ports of destination in their own country. But these relaxations—assuming, as seemed likely, that the right of entry extended to ports blockaded except when otherwise provided might probably be said to fall within that class of cases in which a license to enter might be granted on special grounds: such cases being altogether distinguishable from those in which a belligerent, in his own interest, permitted enemy ships to bring him cargoes from their own ports whilst maintaining the blockade of the latter against neutrals.

But even if it were assumed that the blockade was not legally invalidated on these grounds, it still remained to see whether the notice was effectual. As to this it was not, indeed, essential, according to the principles adopted by the British Prize Courts, even in the case of a blockade *de facto*, and whether as regards ingress or egress [illegible], that special notice should be given, so long as there was proof of knowledge, actual or constructive [illegible].

[illegible] of these being governed [illegible] represents the [illegible] and by the same principles, subject only [illegible] Article of War. As to [illegible] proof as to [illegible] already [illegible] later [illegible] p. 415.

But even though such knowledge might be presumed from the general notoriety of the blockade, the notice to be inferred from it must be of such a character that it would have been a good notice if directly conveyed. In either case, in fact, the notice must correspond with the reality of the blockade, and must not be more extensive than the blockade itself. A belligerent could not, for instance, proclaim that he had blockaded several ports, when in fact he had blockaded only one: and any notice of that kind would be ineffectual and might be disregarded by the neutral (*m*). An unlawful warning off, which was in fact acted on, might found a good claim for damages, as in the cases of the "Boyne" and the "Monmouth" (*n*). Applying these principles to the case in hand, the master would be clearly affected by notice of all that was publicly known on the question of the blockade at Copenhagen on the 11th May. But all the evidence on this point went to show that officially and generally the impression then was that a general blockade of all the Russian ports had been established: and that this error had not been publicly corrected. Hence the only notice to be presumed against the master was a notice that he must not proceed to any Russian port: a notice which went beyond the facts, as being more extensive than the blockade actually established; and which was therefore, according to the principles previously stated, not binding on the neutral.

The judgment of the Court of Admiralty in this case may still be said to retain its authority as an exposition of general principles: even though corrected by the Privy Council on certain points as regards their application to. The judgment of the Privy Council also enunciates a number of general principles in relation to blockade, confirming generally those laid down in the Court below. But it, moreover, it decides two points of considerable importance. One is that the due enforcement of a blockade against all vessels alike is an essential condition of its validity, and that any general relaxation of its restrictions in favour of belligerents only to the exclusion of neutrals will render it invalid. The other is that notice of the blockade, however derived to,

(*m*) [illegible] 1 C. [illegible], p. 100.
(*n*) 2 Dods. 150. Whether, that is, from notice
See Thorne, Int. [illegible] 5 C. [illegible] special warning, or a notice
[illegible]

must correspond with the actual facts of the blockade, under pain of being held inoperative against neutrals. Taken together, these judgments embody the results of a great variety of previous decisions, and in this way convey what is at once a statement and an illustration of the more important principles that underlie the law of blockade from the point of view of the British Prize Courts. The rules actually laid down, moreover—with the exception perhaps of those relating to the presumption of notice from general notoriety and the legality of licenses (*q*)—appear to correspond in substance with the rules now embodied in the Declaration of London (*r*).

Turning to the law of blockade in general, it will be convenient, in our survey of this, to touch first on the British view, with which the American in the main agrees; noticing incidentally certain points on which the prevalent European view differs from these; and thereafter to consider the rules which have now been formulated on this subject by the Declaration of London (*s*).

At the outset, it is necessary to distinguish a war blockade, such as we are here concerned with, from a so-called "pacific blockade," which, as we have seen, is not strictly an operation of war, and cannot rightly be enforced against neutrals (*t*). The former may be defined as "an act of war carried out by the warships of a belligerent, detailed to prevent access to or departure from a defined part of the enemy's coast" (*u*). As a technical procedure, blockade is virtually limited to obstruction of passage by sea and by the action of naval forces. Its object in general is to cut off all communication by or from the sea with the blockaded place (*x*): although it is sometimes instituted to prevent egress only, or ingress only, in which cases it is usually known as a "blockade outwards," or a "blockade inwards" according to the nature of its object (*y*).

A "military" or "strategic" blockade is one undertaken as part of or as incident to some military operation that is proceeding on land. A "commercial" blockade, on the other hand, has no immediate military end, but aims rather at weakening the enemy by cutting off his commerce with the area blockaded. The legality of this form of blockade was originally questioned by the United States, and its abandonment stipulated for as one of the conditions on which alone the United States would accede to the Declaration of Paris (*z*). Nevertheless, during the Vicksburg civil war, the United States proclaimed a blockade of the entire coast of the Southern Confederacy, extending over some 2,500 miles, and requiring some 100 vessels for its maintenance. This blockade, although avowedly "commercial"

(*s*) . . . pp. 398, 401.
(*t*) . . . p. 415.
(*u*) . . . p. 414.
. . . 3 K. B. 335.
. . . Manual . . . 151.
. . . (1855), . . . 7 Moo. P. C. . . .
. . . Nav. . . . 1865 . . . 215.
. . . 2 Wheaton, 191, 254.
. . . Prize Cases, . . . Nav. Papers, 1900, p. 5; and 1905, No. 5 (1906), p. 35.
. . . 7 C. C. R. 136.

and not 'strategic,' proved ultimately of considerable military importance, and contributed largely to the overthrow of the Confederacy (*z*). And the evidence thus afforded of its utility as an operation of war contributed, again, towards establishing it as a permissible measure (*a*).

A blockade may take effect on one or more ports, or the mouth of a river, or a part of the coast, or even the whole sea-board of the enemy territory. Enemy territory for this purpose will include all territory which belongs to an enemy, whether in full ownership or under the guise of a lease or a colonial protectorate (*b*), or which is in his actual occupation and control, whether political or military. So, in 1904, Japan proclaimed a blockade of the Liaotung Peninsula, including Port Arthur, and also of the coast of Manchuria; although these areas were still formally subject to the sovereignty of China. But a belligerent cannot otherwise (*c*) blockade neutral territory (*d*); nor may he institute or enforce a blockade of enemy territory in such a way as to prohibit or obstruct access to neutral territory (*e*). So if one bank or the upper part of a river lies in neutral territory, a belligerent cannot lawfully interfere with free access, in the ordinary course of navigation, to the other bank or the lower part (*f*). Hence the action of the United States Courts, on the occasion of the blockade of the Rio Grande, during the civil war, in requiring neutral vessels bound for Mexican ports to keep strictly on the Mexican side, which was not always possible in the usual course of navigation, under pain, if found north of the line of demarcation, of being exposed to arrest and trial and of being mulcted in costs and expenses even though shown to have a *bonâ fide* neutral destination (*g*), must be regarded as oppressive and unwarrantable (*h*).

In order that a blockade may be valid, and that the penalty may take effect as against neutral vessels, it will be necessary to show (1) that the blockade was duly established; (2) that it was effective in fact; (3) that it was duly maintained in the sense both of being enforced continuously and enforced against all vessels (*hh*); (4) that there was some act of violation either by ingress or egress on the part of the vessel against which its penalties are invoked; and (5) that there was actual or constructive knowledge on the part of those responsible for the action of the vessel (*i*).

(*z*) Taylor, 764.

(*a*) p. 385.

(*b*) vol. i. 110, 112. As to a curious question that arose between Great Britain and France relative to the [illegible] of Savoy during the war with it, in [illegible] to the neutral control [illegible] the enemy.

[illegible] p. 415.

[illegible] 77; [illegible] 4 C. Rob. 63; [illegible] Hall, 713; Taylor, 765.

[illegible] 15 Wall. 170.

[illegible] neighboring free [illegible] coast country, Hall, 714.

[illegible] Saving the exceptions [illegible] p. 342.

[illegible] 1 C. Rob. 96; which is [illegible] Hall, 713.

(1) With respect to due establishment it is essential, in the first place, that the blockade should be instituted under authority of the belligerent Government. This authority is usually conferred on a naval officer by express instructions from his Government. Nevertheless, an officer in command of a naval force which is operating out of reach of express instructions (although in view of modern methods of communication such cases are now less likely to occur) will be deemed to have a delegated authority for this purpose. But even in such a case his action in imposing a blockade must be subsequently approved and adopted by his Government; the effect of such adoption being then to validate it *ab* as from the date when it was originally imposed *b*. And with this the practice of other States appears to agree.

As regards notification, although under the British practice a public or diplomatic notification is, as we have seen, not a legal requisite to the validity of a blockade, it is usual for the Government either in ordering a blockade, or in adopting one already established *de facto*, to notify the fact to neutral Powers through the ordinary diplomatic channels, and also to publish the fact to its own subjects; whilst it is also the duty of the officer in command of the blockading force to take such steps as he conveniently can to bring it to the knowledge of the authorities of the ports blockaded, and especially of the foreign consuls there *c*.

(2) With respect to the conditions required to render a blockade effective, there was formerly a great divergence alike of opinion and practice. In the first place, in the earlier period belligerents had been wont to issue declarations of blockade in cases where the blockade was unsupported by any adequate force or at times even by any force: thus exposing neutral vessels to the risk of chance capture *d*. Such blockades came to be known as "paper" or "cabinet" blockades. Towards the close of the 18th century their illegality was generally asserted by neutrals *e*; although this just pretension was consistently disregarded by belligerents in the succeeding wars *f*. It was to guard against blockades of this type that the Declaration of Paris, 1856, provided that "blockades in order to be binding must be effective, that is, maintained by a force sufficient really to prevent access to the coasts of the enemy" *g*. In the second place, even after this, there was still some divergence of opinion and practice as to the conditions requisite to "effectiveness." According to the

b Per Lord Stowell, in the case of the Arthur, 1 C. Rob. 411.

c See the British Memorandum, [illegible] 6 C. Rob. 364; The Spindler, at 144.

d See the British Memorandum, [illegible] 2 C. Rob. 110; [illegible] 397.

e Which according to the Anglo-American doctrine might have [illegible] of knowledge of the alleged blockade and a present intent to violate it: [illegible] p. 110.

f As in the Declarations of the Armed Neutralities of 1780 and 1800, although here coupled with conditions not conceded under the British practice: see Taylor, 761.

g See Law of Capture, s. 188, [illegible] Art. 4.

prevalent European view it was necessary for this purpose that ingress or egress should be barred by ships that were either stationary or in close proximity to each other (*r*), in such a way as to expose any vessel attempting to pass the line of blockade to a cross fire from two or more ships (*s*); although this view may now probably be regarded as abandoned (*t*). According to the British view, on the other hand, a blockade is deemed to be effective if it is maintained by a force sufficient, under ordinary circumstances (*u*), to expose any vessel attempting to enter to obvious danger and probable capture, even though some vessels may succeed in getting through (*x*). And with this the view of the American Courts appears to agree. So, in the case of the *Olinde Rodrigues* (174 U. S. 510; Scott, 835), the Supreme Court ruled that the effectiveness of a blockade, being at bottom a question of fact, was dependent on proof of evident danger of entrance, having regard to all the circumstances of the case, and especially the local situation, and the speed, armament, and equipment of the vessel or vessels employed; and that if egress or ingress was shown to be dangerous in fact, it was not open to a neutral to challenge the validity of the blockade merely on the ground that it had not been carried to the highest degree of efficiency from a purely military standpoint. Proceeding to apply this principle to the case in hand, the Court held that a blockade of the port of San Juan, in Porto Rico, a town of no great population and having only one entrance, was effective, even though kept only by a single cruiser possessing a modern armament and equipment (*y*). The Anglo-American view may probably be said to represent the existing law; both as being more in keeping with the conditions of modern naval warfare (*z*), and as being now implicitly sanctioned by Convention (*a*). Although the presence of some naval force is necessary to the existence of a valid blockade, yet shore batteries and the artificial obstruction of navigable channels (*b*) may be used in aid of naval operations, and must then be taken count of in estimating its effectiveness (*c*). But proximity to the blockaded place is not in itself essential, so long as the blockading force is so situated as to prevent, or to cause danger of, entrance (*d*).

(*r*) Whether with or without the aid of shore batteries.

(*s*) Hall, 704, n.

(*t*) See Report, Proces Higgins, 580; Parl. Papers, Misc. No. 5 (1900), 255, 292. It is unnecessary, having regard to the equipment of modern warships, and an added source of danger having regard to the risk of attack, at any rate on a defended coast, from torpedoes and submarines.

(*u*) That is, after making all due allowance for exceptional conditions of weather, such as fogs or tempests.

(*x*) *The Neptune*, 1 Victoria, 57; *The Leda*, Spinks, at 115; *Geldenhuys* v. *Nagel* (L. R. 7 Q. B. at 410).

(*y*) At one time *The Yosemite*, an auxiliary cruiser, having a speed of 15 knots and a gun range of 3 miles; and, at another, *The New Orleans*, an armoured cruiser, having a speed of 22 knots, a gun range of 6 miles, and an electric light range of 10 miles.

(*z*) See *ante*, p. [illegible].

(*a*) See the Declaration of London, Art. 3.

(*b*) For instances in which the admissibility of this has been discussed internationally, see Moore, Digest, vii. § 1286.

(*c*) *The Circassian*, 2 Wall. 135; *The Leda*, Spinks, at 115; p. 396, *ante*.

(3) A blockade must also be continuously maintained. According to the British view, its validity will not be impaired by the temporary absence of the blockading squadron owing to adverse weather, provided the station is resumed with due diligence; but it will be impaired if the blockading force neglects otherwise to maintain it efficiently, or if it is diverted to other employment, or if it is driven off by superior force (*e*). If a blockade, even though originally well established, fails at any of these points, it will need to be re-established in the same way as an original blockade (*f*). It will, as we have seen, also be invalidated if the blockading force neglects to enforce it impartially against all vessels; for the reason that such restraints are as regards neutrals justified only by military necessity (*g*), and that if some vessels, and especially belligerents, are given access for trade, it shows that no such necessity really exists (*h*). The question of what acts will amount to breach of blockade will be considered in connection with the case next following (*i*).

(4) With respect to the question of notice, while all systems agree in requiring notice of the blockade as a condition of neutral liability, there was formerly a marked divergence between the British practice, with which the American and Japanese in the main agree, and the French practice, which was followed by certain other European Powers (*j*), as to the nature of the notice required. According to the French practice, in addition to the requirement of a general notification and a declaration addressed to the local authorities (*k*), a special notification was necessary; and no vessel was deemed to be liable, in the matter of ingress, unless she attempted to enter after having received express notice from a warship of the blockading squadron endorsed on her papers (*l*). But this rule had the disadvantage of enabling vessels intent on breaking blockade to make at least one attempt without incurring liability; and appears, on the occasion of the Naval Conference, to have been abandoned by its chief adherents (*m*). According to the British practice, on the other hand, although there must be some notice, yet such notice may be actual or presumptive (*n*). As regards egress, the fact of blockade is in general sufficient in cases where egress is unlawful (*o*). As regards ingress, in the case of a blockade *de*

(*e*) *The Leda*, 1 C. Rob. 86; *The Columbia*, 1 C. Rob. 154; *The Hoffnung*, 6 C. Rob. 112; *The Franciska*, Spinks, 111. On the question of diversion, see a discussion between Great Britain and the United States as to the interruption of the blockade of Charleston: Moore, Digest, vii. 843.

(*f*) Westlake, ii. 235.

(*g*) See *ante*, p. 400.

(*h*) But as to certain exceptions, see *ante*, pp. 412, 415.

(*i*) *Infra*, p. 410.

(*j*) Such as Italy and Spain, but not Germany or Holland.

(*k*) *Infra*, p. 416.

(*l*) See Parl. Papers, Misc. No. 5 (1909), p. 30 (France), p. 41 (Italy), but also p. 4 (Germany), and p. 51 (Holland).

(*m*) See M. Fromageot's Declaration, *ibid.* at 161.

(*n*) *The Betsey*, 1 C. Rob. 93; *The Frau Anna Catharina*, 1 C. Rob. 150; but see *infra*, p. 411.

facto, express warning must be given and endorsed on the ship's papers, unless the blockade has been subsequently notified, or has become notorious (*p*). But in a blockade by notification, notice will be presumed if the notification was duly issued and there has been sufficient time for the vessel to receive it (*q*); it being the duty of the neutral Government to communicate such notice to its subjects (*r*). Notice will also be presumed if the master refuses to attend to the summons of a warship of the blockading squadron (*s*). Notice on the part of the master will affect the owners of the vessel, and also such cargo as may be owned by them (*t*).

5. With respect to cessation, a blockade may come to an end in the following ways: (1) If it is declared to be raised either by the blockading Government or by the officer in command of the blockading forces, in which case all necessary steps ought to be taken to notify the fact to neutrals. But mere misinformation given to a particular vessel by an officer of one of the blockading ships will not have this effect, although it will entitle the vessel to express notice before she can be held liable (*u*). (2) If it ceases to be effectively maintained or enforced, in the sense previously described, or if it is vacated by the pressure of the enemy, in either of which cases it must be formally re-established before it can be enforced anew (*v*). (3) If the blockaded place is actually occupied by the forces of the blockading Power (*w*). But on this point the American decisions are not in agreement with the British. So, in the *Circassian* (2 Wall. 135), it was held by the Supreme Court that the blockade of New Orleans was not raised, in favour of neutrals, by the occupation of that place by the United States forces, on the ground that it had only recently occurred and was liable to be vacated by the enemy troops who were still in the vicinity. The authority of this case, internationally, is indeed discredited by the subsequent award of an indemnity in respect of the capture by a Joint Commission to which the matter was referred (*x*). Nevertheless it was followed in the *Adula* (176 U. S. 361), where it was held that the occupation of the Spanish port of Guantanamo, the city still remaining in the hands of the Spaniards, did not have the effect of raising the blockade. If, in such cases, the occupation of a blockaded place, even though covering the sea entrance, is only partial, it would appear quite legitimate to refuse to treat the blockade as raised.

(*p*) *The Neptunus*, 2 C. Rob. 110; *The Franciska*, Spinks, 111.

(*q*) *The Vrouw Judith*, 1 C. Rob. 150; *Theodore Parker*, 2 C. Rob. 131; *The Neptunus*, 2 C. Rob. 110.

(*r*) See the British Memorandum, p. 6.

(*s*) *The Neptunus*, 2 C. Rob. 110; *The Hoffnung*, 6 C. Rob. 112.

(*t*) See the British Memorandum, p. 6.

(*u*) See Moore, Int. Arb. i. 929.

(ii) BREACH OF BLOCKADE.

THE "FREDERICK MOLKE."

(1798; 1 C. Rob. 86; Tudor, Leading Cases in Maritime Law, 1911.)

Case. During war between Great Britain and France, the "Frederick Molke," a Danish vessel, was captured by the British when coming out of the port of Havre, then under blockade. The vessel was then bound on a voyage to the coast of Africa with a miscellaneous cargo; but it appeared that she had previously cleared from Lisbon, nominally for Copenhagen but really for Havre, and that the master had made that port in the face of an express warning given him by a British frigate in the vicinity. A claim to restitution was made, apparently on the ground that the vessel had deposited her cargo and was at the time of capture on a neutral destination. In the result, and upon a review of the principles governing breach of blockade, it was held that both ship and cargo were liable to condemnation.

Judgment. Sir W. Scott, in giving judgment, stated that he should address himself primarily to the question of the actual violation of the blockade, inasmuch as if that were determined against the claimant a discussion of the other points would be unnecessary. As to this, he held that the evidence went to show the master had been duly warned; that there were warships on the station to prevent ingress, this being sufficient to constitute a blockade; and that the master had knowingly evaded it. But it was still more material that the blockade in the present case had continued until the ship came out. The blockade had indeed ceased, but was still in force, for the reason that an accidental intermission due to the weather did not remove it. It was said that on the analogy of contraband the delinquency of the former voyage could not be looked to. But there was really no analogy; for the object of blockade was to cut off all communication of commerce with the blockaded place, and the act of egress is in fact just as culpable as that of ingress. There might be cases of [illegible] egress, as where vessels [illegible] for blockade, in which case they might be at liberty to do this, although [illegible] in

such a case the question of liability might arise if they attempted to carry out cargo. In the present case, however, both ingress and egress were criminal; and both ship and cargo, being the property of the same person, were subject to confiscation.

This case serves to illustrate the general conditions of neutral liability as regards breach of blockade; namely, that there must be a valid and subsisting blockade, some knowledge thereof on the part of the neutral, and, finally, some evasion or attempt at evasion on his part, whether by ingress or egress. But in practice, and under the customary law, we find that the rules with respect to liability for breach are somewhat more elaborate.

According to the British practice, a breach of blockade may be of "blockade inwards," by which ingress is prevented, or "blockade outwards," by which egress is prevented (*a*); although a blockade is usually designed to prevent both ingress and egress (*b*). With respect to ingress, a vessel having actual or presumptive notice of the blockade (*c*) will be deemed to be guilty of breach (1) if she passes or attempts to pass into the blockaded port (*d*); or (2) if she approaches the blockaded port, or is found in its vicinity, in circumstances warranting a presumption of an intention either to enter it herself or to discharge her cargo into other vessels for transport to it (*e*). In the case of a blockade by notification, moreover, a vessel was, strictly, liable to capture and condemnation if she even sailed on a destination to the blockaded port, however distant she might be at the time of capture (*f*), unless she could show either that the intention to make the blockaded port had been wholly abandoned prior to capture (*g*), or, in the case of distant voyages, that she intended only to make the port if permissible (*h*). But although this was the strict rule of the Prize Courts, it appears that under the later British practice, at any rate, vessels were never in fact seized for breach of blockade except when found close to or approaching the blockaded port or coast (*i*). The American law, with respect to breach of blockade by ingress, is in the main similar to the British (*k*). But under the Continental practice, previously referred to, there could

(*a*) Manual of Naval Prize Law, Art. 129.

(*b*) [illegible], p. 403.

(*c*) [illegible], p. 408.

(*d*) *The Imina*, 3 C. Rob. 167.

(*e*) *The Betsey*, 1 C. Rob. 332); the latter exception being founded on the difficulty of obtaining precise information as to the blockade; an excuse which would rarely avail now.

(*f*) See the British Memorandum; Parl. Papers, Misc. No. 1 (1909), p. 26.

(*g*) *The Circassian*, 2 Wall. 135; and, generally, Hallock, c. 23, and Moore, Digest, vii. 820 (*et seq.*, where the cases are collected.

(*h*) *The Columbia*, 1 C. Rob. 154; *The Neptunus*, 2 C. Rob. 110.

(*i*) Assuming, of course, that the blockade still continued; see *The Columbia*, 1 C. Rob. 154; *The Neptunus*, 2 C. Rob. 110.

(*k*) *The Circassian*, 2 Wall. 135; and, generally, Hallock, c. 23, and Moore, Digest, vii. 820 (*et seq.*, where the cases are collected.

be no breach by ingress, unless there had been an attempt to enter, after special warning given in the vicinity of the blockaded port (*l*). The question of the application of "the doctrine of continuous voyages" to cases of blockade, and the extensions of that doctrine by the American Courts during the civil war will be considered hereafter (*m*). With respect to egress, it had long been usual to allow neutral vessels already in port at the time of the institution of the blockade to come out, either in ballast or with cargo *bonâ fide* laden before blockade, within a time limited for that purpose (*n*); this being usually not less than fifteen days although sometimes longer (*o*). The British practice not only conforms to this usage with respect to egress, but, in default of any time being limited for that purpose, allows neutral vessels already in port at the time of the institution of the blockade to come out freely, so long as they are in ballast or laden with cargo *bonâ fide* taken on board before the blockade commenced (*p*). Subject to these exemptions, however, a vessel will be deemed to be guilty of a breach by egress (1) if she comes or attempts to come out of a blockaded port after time; or (2) if she is found in the vicinity of the port in circumstances warranting a presumption of intention to take up cargo from other vessels that have come from the blockaded port (*q*). According to the British practice, moreover, a vessel which has succeeded in breaking blockade outwards remains liable to capture until the conclusion of her principal voyage (*r*), unless the blockade has been meanwhile discontinued (*s*). The American practice with respect to breach of blockade by egress is, again, in accord with the British (*t*). The Continental practice, in general, concedes the right of egress to neutral vessels already in port at the time of the institution of the blockade; and also treats the fact of blockade as being in itself sufficient to affect with notice vessels already in the blockaded port (*tt*); but it differs from the Anglo-American practice, mainly, in holding that a vessel can only be captured for breach within the range of

[1] But see now p. 407, n. (*m*), *infra*.

(*m*) See p. 471, *infra*.

(*n*) This was based on a recognition that the right of interdicting communication with an enemy port did not extend to the confinement of neutral vessels already in port, even though it might warrant the prohibition of any further trading: see Hall, 707.

(*o*) The limit of fifteen days was adopted by Great Britain and France in 1854; by the United States in 1861, except when extended for special reasons; by France in 1870; whilst in 1898 the United States gave thirty days: see Hall, 708; Taylor, 775. But on the blockade of the Liao-tung Peninsula in 1904 no days of grace were allowed by Japan, it being alleged that there were no foreign ships then in port, except Chinese junks in the service of the enemy: see Takahashi, 373.

(*p*) See *The Frederick Molke*, 1 C. Rob. 86); *The Franco*, 3 C. Rob. 150; Manual of Naval Prize Law, 34.

(*q*) See *The Charlotte Christine* (6 C. Rob. 101; and the British Memorandum, p. 7.

(*r*) *The Welvaart van Pekela* (2 C. Rob. 128); *The Gerasimo Hamilton* (6 C. Rob. 61).

(*s*) *The Lucile* (6 C. Rob. 387).

(*t*) See Moore, Digest, vii. 835 *et seq.*

(*tt*) In the sense, that is, that no special notification is required, as in case of ingress; see p. 407.

action of the blockading force, or if pursued and taken before reaching a neutral port (*a*).

There are, however, certain cases in which ingress or egress is usually allowed or excused. Under the British and American practice, this exemption from the ordinary rule of blockade extends to the following classes of vessels: (1) Neutral warships, which are usually permitted to have access to the blockaded port or coast under proper restrictions and for a proper object (*b*), although this is rather a matter of comity than of right (*c*). Akin to this is the permission usually given to the resident minister of a neutral State to send out a vessel carrying distressed seamen of his own nationality (*d*). (2) Neutral vessels which have been compelled by stress of weather, or the need of provisions or repairs, to put into the blockaded port as the only accessible port in the circumstances (*e*). (3) Vessels which have received a special license from the Government of the blockading State (*f*), or the commander of the blockading force (*g*). And these exemptions, with the exception perhaps of the last, are also recognized in the practice of other States.

Finally, we need to notice that a neutral vessel is not guilty of breach of blockade by egress merely by reason of loading a cargo which has been brought to her from a blockaded port or coast after being transported overland or by inland navigation to a neutral or open port; nor yet of breach of blockade by ingress merely by reason of carrying a cargo ultimately destined for the blockaded port, so long as the cargo is intended to be actually discharged by her at a neutral or open port (*d*).

(iii) LIABILITY OF CARGO IN CASES OF BLOCKADE.

THE "PANAGHIA RHOMBA."

1858: 12 Moo. P. C. 168.

Case. In 1855, during war between Great Britain and Russia, the "Panaghia Rhomba," a vessel sailing under the Greek flag,

(*a*) See, by way of example, Parl. Papers, Misc. No. 5 (1906), p. 30 (Turkey); p. 41 (Italy).

(*b*) As to the question of the removal of diplomatic agents, consuls, or commanders of ships with their blockading authorities, see now the Declaration of London, Art. 6.

(*c*) 1 Hall, 713.

(*d*) *The Helena*, 4 C. Rob. 3; *The Diligentia*, 1 C. Rob. 391; *The Vrouw Judith*, 1 C. Rob. 150; *The Frau Margaretha*, 1 C. Rob. 252.

(*e*) The decision being particular and not "in excess of the limits of some special occasion": *The Hoop*, 1 C. Rob. 196, pp. 198, 199.

(*f*) Although a permit from the superior officer will not be sufficient: *The Hoop*, 1 C. Rob. 196; *The Eagle*, 1 Dods. 226.

(*g*) See *The Ocean*, 3 C. Rob. 297; *The Stert*, 4 C. Rob. 65; *The Jonge Klassina*, 4 C. Rob. 79; and the British Memorandum, p. 7; and as to the infraction of this latter principle by the American Courts during the Civil war, p. 471, *infra*.

and carrying a cargo of wheat consigned to neutral ports (*a*), was captured by H.M. ship "Dauntless," off Odessa, and sent in for adjudication, on the ground of having attempted a violation of the blockade of that port. The evidence went to show that the vessel was the property of a Greek merchant; that the cargo was the joint property of an Ionian merchant resident in Turkey and a London firm; and that the vessel was at the time of seizure really making for Odessa, without any justification under the plea of necessity set up by her owners. In the Court below both ship and cargo were condemned, even though the learned judge was of opinion that the owners of the cargo were not in fact cognizant of the intended violation of blockade. On appeal to the Privy Council the decree of condemnation was affirmed, both as to ship and cargo: it being held that, inasmuch as the blockade was known or might have been known at the time the cargo was shipped, the owners of the latter were bound by the illegal act of the master.

Judgment. In the judgment of the Judicial Committee, which was delivered by the Rt. Hon. T. Pemberton Leigh, the question in issue was stated to be whether, having regard to the fact that the ship had been rightly condemned, it was open to the claimants of the cargo to protect their property by showing their innocence, or whether they were concluded by the illegal act of the master even though done without their privity or against their wishes. In the Court below it had been held that they were so concluded. In the "Mercurius" (1 C. Rob. 80), Lord Stowell appeared to have held that a violation of blockade by the master affected the ship but not the cargo, unless it was the property of the same owner, or unless the owner was cognizant of the intended violation. But subsequent cases appeared to have carried the rule much further, and to have established that where the blockade was known or might have been known to the owners of the cargo at the time when the shipment was made, and where the owner might therefore by possibility be privy to an intention of violating the blockade, such privity was to be assumed

(*a*) The Pax et Fides.

as an irresistible inference of law which could not be rebutted: and that in such a case the master must be treated as the agent for the cargo as well as the ship (*b*). Such a rule, although it might in its application to particular cases be attended with some hardship, was nevertheless necessary in order to prevent fraud, and applied not merely to neutrals but to all persons whatsoever, whether they were aliens or subjects of the country enforcing it.

The justification of this rule lies in the fact that in nearly all cases of breach of blockade the attempt is made for the benefit and with the privity of the owners of the cargo. If cargo owners were at liberty to set up their innocence of the act of the master, such a plea would invariably be raised, and would often be supported by evidence which it would be difficult or impossible for a captor to refute, with the result of relaxing largely the deterrents to blockade-running. In the case, moreover, where the attempted violation of blockade was in fact made against the instructions or wishes of the cargo owners, the latter will have their remedy against the master and owners of the ship (*c*). But the cargo will not be condemned when it is shown that the goods were shipped before the blockade was or could be known (*d*).

General Notes. *The Law of Blockade under the Declaration of London.* So far we have considered only the customary law of blockade, or rather the national interpretation of that law on the part of particular States; noticing in the result a considerable divergence alike of theory and of practice. On this, as on other subjects connected with neutral trade, it was, as we have seen, attempted on the occasion of the Naval Conference of 1908 to arrive at some agreement as to what were the "recognized rules of international law" within the meaning of the Hague Convention *etc.* This was in great measure accomplished by the Declaration of London, 1909. This Declaration will, if ratified, become binding on the States that accept it, to the extent previously indicated *(e)*; whilst its rules will be incorporated and applied by the International Prize Court, if and when that Court is established *(f)*. But even if it should not be

(*b*) *The Hoop*, 1 C. Rob. 196; *The Ringende Jacob*, 1 C. Rob. 89; *The Stert*, 4 C. Rob. 253; *The Vrouw Judith*, 1 C. Rob. 150; *The Neptunus*, 3 C. Rob. 108; *The Imina*, Edw. 28; *The Jonge Klassina*, Edw. 129; *The Adonis*, Edw. 261; *The Jonge Tobias*, Edw. 261; *The Rolla*, 6 C. Rob. 364.

(*c*) *The Ringende Jacob*, 1 C. Rob. 89; *The Imina*, Edw. 28; *The Jonge Klassina*, Edw. 129; *The Adonis*, Edw. 261; *The Jonge Tobias*, Edw. 261; *The Rolla*, 6 C. Rob. 364.

(*d*) *The Hoop*, 1 C. Rob. 196; *The Stert*, 4 C. Rob. 253; *The Vrouw Judith*, 1 C. Rob. 150; *The Neptunus*, 3 C. Rob. 108; *The Imina*, Edw. 28; *The Jonge Klassina*, Edw. 129; *The Adonis*, Edw. 261; *The Jonge Tobias*, Edw. 261; *The Rolla*, 6 C. Rob. 364.

(*e*) See Arts. 66, 69; and [illegible] p. 387.

(*f*) No. 12 of 1907, Art. 7.

(*g*) *Supra*, p. 194.

extensively ratified the Declaration is nevertheless likely, for the reasons previously given (*h*), to become in a great measure the standard of international action in the future (*i*). Hence, in relation both to blockade and other topics connected with neutral trade, it will be desirable to see how far the customary or national rules on these subjects are affected by its provisions.

The Scope of Blockade. On the question of the scope of blockade the Declaration expressly provides that a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy (*k*); and further, that a blockading force must not bar access to neutral ports or coasts (*l*). This merely confirms a principle which is, as we have seen, now universally accepted in theory and commonly followed in practice (*m*).

Essentials to the Validity of a Blockade. Under the Declaration, a blockade in order to be binding must comply with the following conditions: In the first place, it must be "effective," that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coast line (*n*). This merely adopts the formula and definition contained in the Declaration of Paris, 1856 (*o*). The question of effectiveness is also declared to be a question of fact (*p*). This confirms the Anglo-American view which holds that the question is one to be determined in the light of the circumstances of each particular case, and especially the local situation, and the nature and calibre of the force employed (*q*)—and may probably be said to dispose of the Continental theory previously referred to (*r*). In the second place, the Declaration implicitly recognizes that a blockade must be duly maintained in the sense previously indicated (*s*), whilst at the same time providing that a blockade shall not be deemed to be raised by the temporary withdrawal of the blockading force owing to stress of weather (*t*). In the third place, in order to be binding on neutrals, the blockade must have been "declared" and "notified" (*u*) in accordance with the provisions mentioned below. Finally, it must be applied impartially to the ships of all nations (*v*); subject, however, to a right on the part of the commander of a blockading force to allow a neutral warship to go in and come out of a blockaded port (*w*), and also to a right of entry and exit on the part of a neutral vessel in circumstances of distress acknowledged by an officer of the blockading force, so long as no cargo is discharged or taken on board whilst in the blockaded

(*h*) *Supra*, p. 387.
(*i*) As, indeed, was the case in the Turco-Italian war of 1911.
(*k*) Art. 1.
(*l*) Art. 18.
(*m*) *Supra*, p. 401, and for local qualifications of the principle of blockade by enemy ports, p. 418.
(*n*) Art. 2.
(*o*) *Supra*, p. 426.
(*p*) Art. 3.
(*q*) *Supra*, p. 406.
(*r*) *Ibid.*
(*s*) See p. 407, *supra*; and Report, Pierce Higgins, 574.
(*t*) Art. 4.
(*u*) Art. 8.
(*v*) Art. 5.
(*w*) Art. 6.

port : . On most of these points the Declaration, it will be seen, virtually affirms the rules and usages recognized under the British practice (*a*).

The Declaration of Blockade. A declaration of blockade is a formal statement specifying for the purposes of the notification hereafter described (1) the time at which a blockade commences; (2) its geographical limits; and (3) the period within which neutral vessels may come out. It must be made either by the Government of the State imposing the blockade, or by the naval authorities in its name (*b*). If the blockade, as actually enforced, fails to conform to the particulars given, or any of them, then the declaration will be treated as void, and a fresh declaration must be issued in order to legalize the blockade. The declaration itself is thus a formal statement, which binds the belligerent to certain particulars essential to be known if neutrals are to realize how they stand in the matter of restraints on their trade, but which is only made operative by notification. It will be seen that in these as in other provisions, the Declaration of London implicitly recognizes the delegated powers of a naval commander in relation to the institution of blockade (*c*), and the general usage of allowing neutral vessels already in the blockaded port to come out within some time expressly limited for that purpose (*d*).

Notifications Required. Two notifications of the particulars contained in the declaration are required. One of these must be made by the blockading Power itself to neutral Powers; being addressed either directly to the neutral Governments or to their representatives accredited to it. The other must be made by the officer in command of the blockading force to the local authorities of the place blockaded, who are in their turn required to communicate it as soon as possible to all foreign consular officers within the blockaded area (*e*). It will then be the duty of the neutral Governments and the local authorities to publish the facts to all persons within their respective jurisdictions; but whether this is done or not, the effect of the notification will be to raise a presumption of knowledge both on the part of persons within the blockaded area and of neutral subjects generally (*f*). And the same conditions, both as regards declaration and notification, are required to be observed if a blockade is extended, or if it is re-established after having been raised (*g*). The voluntary raising of a blockade, as well as any restriction of its limits as originally declared, must also be notified in the same way (*h*); whilst if a blockade is vacated by the pressure of the enemy, this fact should, it seems, be notified by the latter. A failure on the part of the blockading Power

(*b*) Art. 9.

to notify the raising of a blockade cannot, of course, prolong neutral liability: whilst it would be a proper subject for remonstrance or even for indemnity if any consequent damage could be shown [illegible]. The general effect of these provisions as to declaration and notification is to convert what under the British practice was an obligation binding only in comity, although almost invariably observed in practice [illegible] an obligation which is now in the nature of a legal condition. At the same time, having regard to modern facilities of communication, it does not appear that these requirements are either unreasonable in themselves or unduly burdensome on the belligerent [illegible] is, moreover, still open to a belligerent to enforce a [illegible] from the moment when the required notifications have been given, even as against vessels not yet affected by them, by giving such notification similar to that required under the British Act [illegible] in the case of a blockade [illegible].

Exemption of Neutral Vessels. It is recognized by the Declaration [illegible] vessels guilty of unneutral conduct [illegible] action [illegible] Declaration [illegible] As under the British practice [illegible] is in force [illegible] presumption [illegible] a vessel left a [illegible] of the blockade, [illegible] prevail [illegible] notification [illegible] still [illegible] reach the port [illegible] of the blockade [illegible] previous [illegible] proceed [illegible] is subject [illegible] blockade-runners [illegible] and [illegible] [illegible] [illegible]

assumed to affect vessels already in port with notice, and to render egress, after the time limited, unlawful. It is, however, expressly provided that if, owing to the negligence of the officer in command of the blockading force, a declaration of the blockade has been notified to the local authorities, or if in the declaration as notified no period has been specified within which neutral vessels may come out, then a neutral vessel may come out freely (*a*); although this would not apply to vessels that had entered in violation of the blockade (*aa*). If, on the other hand, the failure to notify the local authorities was not due to the negligence of the commander, then an outgoing vessel must be warned and turned back (*b*). The effect of these provisions is to modify considerably the earlier practice of both groups of States. On the one hand the Continental view, that special notice was necessary in the case of every vessel attempting to enter (*c*), is plainly superseded. On the other hand, the British rule of notice by general notoriety as regards ingress (*d*) is also superseded save perhaps as regards vessels that have touched at an enemy port (*e*). Finally, the rule that the fact of blockade is in itself sufficient notice as regards vessels already in port so far as it obtained (*f*), is displaced by the requirement of notification to the local authorities.

The Local Limits within which Captures may be made. The Declaration also provides that neutral vessels may be captured [illegible] by the [illegible] operations of the warships employed to maintain the blockade (*g*). In the Report accompanying the Declaration this is explained as follows: On instituting a blockade a certain area is decided for this purpose; the ships in command [illegible] vessels at any the line of blockade, and capture [illegible] vessel in the zone which he is to watch; all these zones taken together, and so organized as to make the blockade effective, constitute the area of operations (*h*). The limits within which a capture can lawfully be made will therefore [illegible] of fact to be determined in each particular case, being ordinarily at once on the locality blockaded and the number of vessels employed, but conditional throughout on the blockade being effective at the time of capture (*i*). It is, however, expressly provided that when a vessel has broken blockade outward, or has attempted to break

(*a*) Art. 16, par. 2.
(*b*) See Report, Parts [illegible]
(*c*) [illegible]
(*d*) [illegible] 576.
(*e*) [illegible]
(*f*) [illegible]
(*g*) [illegible]
(*h*) [illegible]
(*i*) American cases do not appear to recognize this limitation.

blockade inwards, she will be liable to capture so long as she is pursued by a ship of the blockading force, although if the pursuit is abandoned or if the blockade is meanwhile raised her liability to capture will cease (*p*). The question of abandonment again will be one of fact. The mere gaining of a neutral port will not exempt the vessel from subsequent capture if the pursuer continues to lie in wait for her; but if she gains a home port then she will be exempt from further liability (*q*). The effect of these provisions, if adopted, would be to abrogate the technical rule of the British and American Prize Courts that a vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as from the time of sailing, by whatsoever vessel captured and at whatsoever distance from the blockaded port (*r*); and also to qualify largely the rule that a vessel which has succeeded in breaking "blockade outwards" remains liable to capture until the termination of her principal voyage (*s*).

"The Doctrine of Continuous Voyages" in relation to Blockade.—Finally it is provided that whatever may be the ulterior destination of a vessel, she cannot be captured for breach of blockade if at the moment she is on her way to a non-blockaded port (*t*). This negatives any further application of the doctrine of "continuous voyages" in cases of blockade (*u*): whilst still leaving it open to a captor to show that an alleged destination to a neutral port is not genuine (*uu*).

The Liability of the Goods.—With respect to this, it is provided by the Declaration that where a vessel is condemned for breach of blockade, her cargo will also be liable to condemnation, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break blockade (*v*). This qualifies somewhat the British rule, under which the shipper must have proved that he neither knew nor could have known of the existence of the blockade, although the difference in effect is not very material (*w*).

(*p*) Art. 20.

(*q*) Art. 21.

CONTRABAND OF WAR.

(i) GENERALLY.

THE "PETERHOFF."

[1866; 5 Wall. 28.]

Case. During the American civil war, the "Peterhoff," a British vessel, whilst on a voyage from London to Matamoras, a neutral port on the Mexican side of the Rio Grande, was captured on the island of St. Thomas and whilst on a proper course for the Rio Grande, by a United States cruiser, and sent in for adjudication, it being alleged both that she was carrying contraband and that she intended to violate the blockade of the coasts of the Southern Confederacy. Her cargo consisted of artillery harness, army boots, cognac, blankets, horse-shoes, shovels, spades, bellows, anvils, nails, and leather, a quantity of iron and steel, a number of drays, and a large quantity of ordinary merchandise. The bills of lading were for delivery at the mouth of the Rio Grande, on the Mexican side of the river; it having been intended, in view of the fact that Matamoras was not at the time accessible for vessels of the size of the "Peterhoff," to discharge the cargo into lighters for delivery there. It was, however, alleged by the captors that the destination to Matamoras was not genuine, and that the goods were really intended to be carried in the lighters to a blockaded port, or in some other way transported to the Confederate territory. In the District Court both ship and cargo were condemned on the ground that the voyage was a sham and a fraud upon the owners. On appeal to the Supreme Court, this decision was reversed as to the ship and the cargo, or a large part of it, was restored, but confirmed as to such part as was contraband or belonged to the same owners.

Judgment. Chase, C.J., in giving judgment, stated at the outset that in the opinion of the Court the voyage of the ship

[a] Blatchford, P. C. 163.

was not a simulated one. Dealing, next, with a contention on the part of the captors that, even if the vessel was destined for Matamoras, this constituted a breach of a blockade of the mouth of the river, the Chief Justice observed that the Court altogether rejected the view that the whole mouth of the river was included in the blockade of the rebel ports (*b*); and, on this point, pronounced both ship and cargo to be clear of liability. Dealing, next, with the question whether the alleged ulterior destination of the cargo to the rebel region by inland navigation or transport rendered it liable to condemnation, he held, upon a consideration of the authorities establishing the lawfulness of a neutral trade to or from a blockaded place by inland navigation or transport (*c*), that a trade from London to Matamoras, even with intent to supply goods to Texas by means of land transportation, could not be regarded as a violation of the coast blockade, and that on this point, too, both ship and cargo were clear of liability. Passing, finally, to the question of the liability of that portion of the cargo which consisted of contraband, the Chief Justice observed, in relation to the general nature of contraband, that the classification of goods for the purpose which was best supported by the American and English decisions might be said to divide all merchandise into three classes. Of these classes the first consisted of articles exclusively used and primarily and ordinarily used for military purposes in time of war; the second of articles which might be and were used for purposes of war or peace, according to circumstances; and the third of articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country or place occupied by the army or navy of a belligerent was clearly comprehended; merchandise of the second class was considered doubtful when destined to the use or service of a belligerent; whilst merchandise of the third class was considered as altogether free, although liable to seizure and confiscation for breach of blockade. A considerable portion of the "Peterhoff" cargo was of the third class, and, being for the use of peaceful persons in a foreign port, was of the second class, "and it was shown to be destined for belligerent use, and was therefore held contraband;" whilst,

(*b*) *See* p. 412.

another part was of the first class, or, if of the second, destined for the rebel military service. This part consisted of artillery harness, army artillery boots and Government regulation gray blankets. It was true that even these goods, if really intended for sale in Matamoras, would be free of liability; for contraband might be transported by neutrals to a neutral port if intended to make part of its general stock in trade. But in the present case the circumstances indicated that they were destined for the use of the rebel forces. Contraband merchandise was subject to a different rule in respect of ulterior destination to non-contraband: the latter being liable to capture only when a violation of blockade was intended, whilst the former was liable when destined to the hostile country or to the military or naval use of the enemy, irrespective of blockade. The conveyance by neutrals to belligerents of contraband was always unlawful, and such articles might always be seized during transit by sea. Hence while articles not contraband might be sent to Matamoras and beyond to the rebel regions where the communication was not interrupted by blockade, articles of a contraband character destined in fact to a State in rebellion or for the use of its military forces were liable to capture, even though primarily destined to Matamoras. For these reasons that portion of the cargo which was of a contraband character, with so much of the rest of the cargo as belonged to the same owners, must be condemned; but the ship and the remainder of the cargo would be restored. Inasmuch, however, as it appeared that the master had destroyed certain papers just before capture, payment of costs and expenses by the ship would be decreed as a condition of restitution *d*.

This case is commonly treated as a leading authority on the doctrine of "continuous voyages," or "ultimate destination," in relation to contraband, and will in that character come under consideration hereafter. It is, however, even more noteworthy as embodying a compendious statement as to the general character of contraband and its governing principles, from the point of view of the English and

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[illegible] As to the proceeds of the [illegible] vessel and cargo, about which [illegible] claim for [illegible] Certain [illegible] of the [illegible] vessel and the [illegible] Cargo were subsequently [illegible] before the British and American [illegible] Court, [illegible] Int. Arb. [illegible] 3838.

American Courts: even though their application in this particular case may perhaps be open to question (*e*). The classification of articles given in the judgment is based on a similar classification originally propounded by Grotius (*f*), which, as developed in the English and American cases, may be said to furnish the framework of the modern law.

Turning now to the general law on the subject of contraband, it will be convenient in our survey, first, to consider the British practice, with which the American for the most part agrees; touching, incidentally, on those points on which the Continental practice diverges from this and certain consequent difficulties; and, thereafter, to consider the rules on this subject which have now been embodied in the Declaration of London (*g*).

Under the British system, the term "contraband" is applied to "neutral property found on board ship either on the high seas, or in the territorial waters of either belligerent, which is by nature capable of being used to assist in, and is on its way to assist in, the naval or military operations of the enemy" (*h*). There are thus two essentials: one being that the articles should be of use in war, and (2) another that they should be taken on a hostile destination (*i*). But in determining the contraband character and consequent liability of particular articles, a distinction is drawn between those which are regarded as "absolute" and those which are regarded only as "conditional" contraband: this distinction being based primarily on a difference in their nature but involving also a difference of treatment in the matter of destination (*k*). "Absolute" contraband denotes articles which are particularly adapted and primarily used for the purposes of war, such as arms, ammunition, and materials for making the same, articles of military equipment, military and naval stores and the like (*l*). Such articles are liable to seizure and condemnation if found on a destination to any place in the enemy territory, whether he be going to or supplied by him, or to the enemy forces; the presumption of an intended use for military operations being in this case conclusive (*m*). "Conditional," or, as it is sometimes called, "occasional" contraband denotes articles, not falling within the above category, which are capable of being used for purposes of war, and also for peaceful purposes, such as provisions or liquids for human consumption, money, obligations, railway stock, horses, hay, and coal. Such articles are liable to seizure if found to be destined for

(*e*) The Peterhoff, 5 Wall. 28; 72 U. S. 28; 18 L. Ed. 564; The Springbok, 5 Wall. 1; 72 U. S. 1; 18 L. Ed. 485; The Bermuda, 3 Wall. 514; 70 U. S. 514; 18 L. Ed. 91; The Commercen, 1 Wheat. 382; 14 U. S. 382; 4 L. Ed. 115;

the naval or military forces of the enemy, or for a place of naval or military equipment belonging to or occupied by him (*o*). The Crown may, however, extend or reduce the lists of articles that are absolute or conditional contraband, subject to such restrictions as attach either by treaty or under the law of nations (*o*). The effect of the British doctrine as regards conditional contraband, was, moreover, somewhat mitigated in effect by the practice of pre-emption (*p*). And with this view of contraband in general the doctrine of the American Courts and the practice of the Executive (*q*) substantially agree (*r*).

European opinion, on the other hand, was generally opposed to those extensions which followed from the British doctrine of conditional contraband, even as qualified by pre-emption (*s*). The distinction between absolute and conditional contraband was, however, by reason of its intrinsic convenience, too important to be altogether ignored even in theory. Hence, in the Continental expositions of contraband we notice two currents of opinion: one of which set itself (although ineffectually as regards its results on practice) to limit contraband to articles of immediate warlike use; whilst the other, with greater regard for practical considerations, recognized the principle of variability, which was the basis of the British distinction, but sought to confine it within the narrowest limits (*t*). In practice, however, we find many European States, notwithstanding [illegible] as unduly oppressive to neutrals, conceding or accepting, even [illegible] lists of contraband [illegible] with Great Britain to [illegible] Canton as contraband, by reason of the importance of rice in the feeding of the Japanese population (*u*); [illegible] claimed [illegible] might be [illegible] Russia, he [illegible] to treat as contraband such foods as coal, and [illegible] irrespective [illegible] proof of military destination (*v*).

[illegible]

(*r*) As is that of [illegible] Reg. Rob., 1800, [illegible] C. Rob., 6; [illegible] also 2; [illegible] Act, [illegible] Rob., [illegible] by [illegible] Dod. [illegible] Rob., [illegible] Gen. Orders, No. [illegible] June, 1885, [illegible]

(*s*) [illegible] Regulations, [illegible] Rob., [illegible] Rob., [illegible] Rob.,

(ii) CONDITIONAL OR OCCASIONAL CONTRABAND.

THE "JONGE MARGARETHA."

[1799: 1 C. Rob. 189; Tudor, L. C. 981.]

Case. In 1797, during war between Great Britain and France, the "Jonge Margaretha," a Papenberg ship, whilst carrying a cargo of cheeses from Amsterdam to Brest, was captured by the British, and sent in for adjudication. There was at the time in the port of Brest a considerable French fleet, which was engaged in preparing for a hostile expedition against Great Britain. The cheeses were exactly such as were used in French and British ships of war; and the cargo was the property of the owner of the vessel. In the result the cargo was condemned as contraband.

Judgment. Sir W. Scott, in giving judgment, observed that the only question really was, whether it was a legal transaction for a neutral to carry a cargo of provisions which were not the product of the enemy's country, but were consigned to the enemy's officers in a port which was the principal station of the enemy's naval equipments? On that question, especially in its regard to the circumstance that a French fleet was at the time preparing [illegible] against Great Britain. The cargo was considered as [illegible] and sometimes in such a manner as to [illegible] that [illegible] out [illegible] of the [illegible] according to [illegible] that [illegible] expedition, which was [illegible] the [illegible] cheeses were [illegible] and [illegible] where, for instance, being more favourably treated than provisions for its human

use (*a*)—which, again, was not the case with the present cargo. But the most important distinction of all was whether the articles were intended for ordinary use or were going on a highly probable military destination. As to this, the port to which such articles were going was a rational although not perhaps an absolute, test. If such port was primarily a commercial port, then there would be a presumption of intended civil use; whilst if such port was primarily a port of naval or military equipment, then there would be a presumption of intended military use; even though, in either case, it might not be possible to determine the final and actual use. But the presumption of hostile use was very much inflamed where, as in the present case, there was in such port a hostile armament preparing, to which a supply of such articles would be eminently useful. The Court, however, had been unwilling to conclude against the claimant on the mere point of destination: and further evidence had therefore been called for. The result of this went to show that the cheeses in question were precisely such as were exclusively used in French ships of war; and this seemed to conclude the matter. The cheeses must therefore be treated as contraband, and condemned. In view, however, of certain circumstances of extenuation, the ship, even though belonging to the same proprietor, would be restored.

This decision was followed by the United States Courts in the case of the *Commercen* (1 Wheat. 382), where, during war with Great Britain, it was held that a cargo of barley and oats on board a Swedish vessel bound for Bilbao, but destined for the use of the British forces in Spain, was liable as contraband, loss of freight being also decreed against the vessel. *b*

The British doctrine of conditional contraband in the form in which it may now be said to have become part of the conventional law of nations, has already been described (*c*). As expounded in the *Jonge Margaretha*, its scope was, it will be seen, somewhat wider; for there it was laid down that provisions, and incidentally other articles *and this case*, might become contraband under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it, and not merely by reason of their destination for warlike use. In this form the doctrine—even though ex-

(*a*) This same rule was applied also [illegible]. See also *Maxwell v. Keats* to other articles: [illegible] 2 C.R. 324. [illegible] ordinarily treated [illegible] p. 423. [illegible] keep their cardage.

pressed in terms which might in certain circumstances operate in relief of the neutral (*d*) was still dangerously wide; and this was probably why it was so strongly opposed by Continental writers, who asserted that its effect was to confer on a belligerent a right to make or unmake contraband at pleasure. It was, moreover, oppressively used during the French revolutionary wars, when Great Britain claimed to treat provisions as contraband, whenever the deprivation of supplies was one of the means employed to reduce the enemy to reasonable terms of peace. Nevertheless, the effect of the doctrine, even in its earlier form, was greatly mitigated under the British system by the practice of pre-emption. Under this, it was usual, in cases where the contraband character of the goods was open to doubt, for the captor, in lieu of confiscating them, to exercise the right of purchasing them at a fair market value (*e*). The British rule in such cases was to pay a fair mercantile value, together with a reasonable profit, usually calculated at ten per cent., as well as freight to the vessel (*f*).

But in its modern form the doctrine of conditional contraband is less wide, and merely sanctions the treatment of articles of mixed use as contraband in cases where it can be shown that they are destined either for the enemy's naval or military forces, or for an enemy port used exclusively, or mainly, as a port of naval or military equipment (*g*).

(iii) NECESSITY OF HOSTILE DESTINATION.

THE "IMINA."

[1800; 3 C. Rob. 167.

Case. In 1798, during war between Great Britain and Holland, the "Imina," a neutral vessel, sailed on a voyage from Dantzig to Amsterdam, with a cargo of ship timber; but having learned in the course of her voyage that Amsterdam was then under blockade, she changed her course for Embden, a neutral port. Whilst on this course she was captured by a British cruiser

(*d*) The circumstances, that is, which are not stated in the Proclamation as rendering a captive liable to seizure of the imposition of hostile contraband: see s. 42).

(*e*) See *Hoffnung*, 2 C. Rob. at 179, where Sir W. Scott gives an account both of the nature and origin of pre-emption. Pre-emption also appears to have been applied to goods absolutely contraband, when they were the produce of the country exporting them and still in an unmanufactured state: see *The Sarah*, 1 C. Rob. 237; Manual of Naval Prize Law, Art. 84.

(*f*) The right of pre-emption still exists under the Naval Prize Act of 1864, s. 38.

(*g*) Manual of Naval Prize Law, Art. 63.

and sent in for adjudication, on the ground of carrying contraband. In the result, it was held that as the ship was captured after she had changed her destination to a neutral port there could be no question of contraband; and both ship and cargo were accordingly restored.

Judgment.] Sir W. Scott, in giving judgment, pointed out that if Embden was to be regarded as the real destination then the question of contraband could not arise. Even if it were assumed, as had been contended, that the cargo was of such a character as to constitute contraband when on a hostile destination, although that was by no means certain, the Court could not fix that character on it in the present voyage. In order to constitute contraband the goods must be taken in the actual prosecution of a voyage to an enemy port. The offence was, indeed, complete as from the moment the vessel quitted port on a hostile destination; but unless there was a hostile destination subsisting at the time of capture, the penalty was not now generally held to attach. In the present case the property had clearly not been taken in the prosecution of a voyage to a hostile port. Had it been taken before the variation of course it might have been liable to confiscation. But as things had turned out, there was no *delictum* existing at the time of capture, and restitution must therefore be decreed. Having regard to the fact, however, that the captors, in view of the original destination, were bound to bring the cause to adjudication, they must be allowed their expenses.

In order to constitute contraband, not only must the articles be in their nature capable of being used by or for the enemy in his warlike operations, but they must also be taken on a hostile destination. The case of the *Imina* serves to illustrate the latter of these conditions. There was, it will be observed, no suspicion of any objective or hostile destination on the part of the cargo, and the question of confiscation therefore goes no further than this, that even the destination of the goods is the same as that of the ship, and when the ship as distinct from the apparent destination of the ship is a neutral port, then there can be no question of contraband.[a]

[a] The doctrine of delegate destination of the goods, in the subsequent case of [illegible] (1 C. Rob. 1), was explained by the Court in this case [illegible] (6 C. Rob. 1), and [illegible] was [illegible]

According to the British view, the destination of the cargo is generally assumed to be that of the ship. When, however, the ship is to call at several ports, some neutral and some hostile, then the presence on board of goods which are *bonâ fide* documented for discharge at a prior neutral port (*b*) cannot be made a ground for detention; but if there is no such documentary evidence, then that port which is least favourable to the neutral will be presumed to be the destination of such part of the cargo as would be contraband if carried to that port (*c*). The question of an ulterior hostile destination on the part of the goods different from that of the ship, will come under consideration hereafter in connection with the doctrine of continuous voyages (*d*).

A ship carrying contraband may be seized at any moment throughout the whole course of her voyage so long as she is on the high sea or in belligerent waters. The view has sometimes been put forward that search should be confined to the actual theatre of the war, or to waters not too distant therefrom (*e*). During the South African war, Great Britain, in the course of the Anglo-German controversy, objected to be called upon to extend her search for contraband beyond [illegible] (*f*). In the Russo-Japanese war, the British Government complained of the extreme inconvenience to neutral commerce of the Russian search for contraband, not only in proximity to the scene of war but all over the world, and especially at places at which neutral commerce could be most unusually interrupted (*g*). But neither in principle nor by usage is such a limitation obligatory.

The liability for carrying contraband ceases when the contraband goods [illegible] (*h*). It was indeed, formerly held that a vessel, which had carried [illegible] on the outward voyage by the aid of false papers and by deceit, was liable to seizure and confiscation on her return voyage (*i*); but [illegible] was held in principle, and would [illegible] British Prize Courts at the present time (*k*).

(*a*) The [illegible] Spreckels [illegible] (1904), [illegible] 6 C. Rob. [illegible] 5 C. Rob. [illegible] 17; [illegible] 3 C. Rob. 322, Bentley, [illegible] 71; [illegible] 471.

(*b*) [illegible] p. 134; but see [illegible] appears to have been made for any [illegible] limite restriction.

(*c*) [illegible] 3 C. Rob. [illegible] 16; [illegible] (1914) C. Rob. [illegible] 4 Wheat. 383; [illegible] 122.

(*d*) [illegible]

(iv) THE PENALTY FOR THE CARRIAGE OF CONTRABAND.

THE "NEUTRALITET."

[1801: 3 C. Rob. 295.]

Case. This was a case of a neutral ship, under Danish colours, which was captured by the British, during war between Great Britain and Holland, whilst carrying contraband to a Dutch port; there being at the time a treaty between Great Britain and Denmark which prohibited traffic of this kind on the part of subjects of either country. In these circumstances it was held that condemnation must extend also to the ship.

Judgment. In giving judgment, Sir W. Scott pointed out that, whatever the earlier practice might have been, the modern rule was that the vessel was not in general confiscable; this relaxation being based on the supposition that freights of noxious or doubtful articles might be taken without the personal knowledge of the owner. But this rule was liable to exceptions; as where the ship belonged to the owner of the cargo, or where the ship made use of a false destination or false papers. The circumstances of the present case constituted yet another exception, by reason of the owners being bound, as subjects of Denmark, not to carry goods of this nature to the enemies of Great Britain; and this would have applied, even if the cargo had been the produce and manufacture of Denmark, which was not, however, the case. The owner was here not only cognizant of the traffic, but it was in breach of explicit obligations arising by treaty. The confiscation of the ship in the present case, however, would have extended the general rule that, under ordinary circumstances, the carriage of contraband works a forfeiture of freight and expenses, but not of the ship itself.

belonging to other owners will be restored, although without compensation for loss arising from delay and detention (*c*). The ship carrying the contraband will in general be restored (*d*), although without compensation for loss of freight or detention (*e*): but (1) any interest in the vessel which belongs to the owner of the contraband will be subject to condemnation; whilst (2) if she made forcible resistance to the captor or carried false papers, or if there are other circumstances of complicity or fraud, the vessel herself will be subject to confiscation, irrespective of ownership (*f*). In the *Neutrality* the same penalty was, as we have seen, extended to the case of contraband carried in violation of treaty.

The Continental practice on this point appears to vary. In some systems the ship herself is confiscated only if all her cargo consists of contraband: in others, if the contraband amounts to three-fourths of the cargo: and in others, again, if any part is contraband (*g*).

But if a ship is seized for carrying contraband and in the result no part of her cargo is condemned, then the captor will be liable to make compensation for the loss sustained by her detention: unless, indeed, there was reasonable ground for suspicion (*h*), in which case restitution will be granted but without costs, or even subject to the payment of costs and expenses to the captor (*i*).

(*c*) See the British Memorandum, p. 5.

(*d*) *Ibid.* *Regenbogen*, 1 C. Rob. 80.

(*e*) *The Ostsee*, [1916] P. 1; 1 C. Rob. 196; although expenses have sometimes been allowed for the detention of contraband goods: see *Ann Caroline*, 1 C. Rob. 105; see also *Two Brothers*, 4 C. Rob. 100; *Vrouw Judith*, 1 C. Rob. 150; *Vrouw Margaretha*, 1 C. Rob. 336; *Jonge Pieter*, 1 C. Rob. 329).

(*f*) *The Jonge Pieter*, 1 C. Rob. 329).

(*g*) See, by way of example, Parl. Papers, 1909, Misc. No. 5, p. 29.

(*h*) That is, some evidence of facts which, if they had been fully established, would have justified condemnation, and some reason for believing that upon further enquiry such facts would be established: see *The Ostsee*, [1916] P. 150; *The Leonade*, 1 Spinks, 217); British Memorandum, p. 5.

(*i*) See *The Ostsee*, p. 181, *supra*; *The Imina*, p. 428, *supra*.

(v) THE CONFLICT OF USAGE AS REGARDS CONTRABAND.

CONTROVERSY, IN 1904, BETWEEN RUSSIA ON THE ONE PART AND GREAT BRITAIN AND THE UNITED STATES ON THE OTHER, WITH RESPECT TO CONTRABAND OF WAR.

P. C. Papers (1905), Russia, No. 1, Correspondence relating to Contraband of War: Hershey, 160—187.

The Russian List of Contraband. On the 27th February, 1904 (a) the Russian Government issued a Provisional Order or Regulations which it proposed to enforce during the war with Japan. These Regulations, among other things, declared the articles which the Government would regard as contraband; and, in order to avoid the risk of neutrals continuing their trade with Russian ports and troops, stated the laws of the Empire and the law of nations, and required the neutral consuls to inform their subjects of these so far as might be necessary for the purpose of avoiding [illegible] and the seizure of contraband cargoes.

The list of articles declared contraband by the Regulations [illegible] (1) small arms and guns; (2) ammunition for firearms; (3) explosives and materials for making explosives; (4) military equipments and camp equipment; (5) articles of military uniform and clothing; (6) vessels bound for an enemy's port, if they appeared from their construction [illegible] to be intended for warlike purposes; (7) coal [illegible]; (8) any kind of rails, railway plant, locomotives, or rolling stock; (9) articles and materials for telegraphs, telephones, and railway construction; and (10) generally, anything intended for warfare by sea or land, as well as ships, provisions, horses, beasts of burden and other animals which might be used for warlike purposes, if transported [illegible]

(a) New style. (b) See Arts. 3—7.

of or destined for the enemy (*c*). These Regulations were later supplemented by Orders issued on the 19th March and 21st April, 1904, by which their stringency was increased; "raw cotton" being added to the list of contraband, whilst the right was reserved to make further additions if occasion required (*d*). These Regulations, it will be seen, took no account of the distinction usually drawn in practice between absolute and conditional contraband, purporting in fact to treat all articles coming under the heads above mentioned as absolute contraband; whilst they included in that category a variety of articles, such as coal, provisions, and, at a later time, raw cotton, which, according to the British and American practice, were either innocent or liable to condemnation only in certain contingencies (*e*). This led to a controversy between Russia on the one hand and Great Britain and the United States on the other, which serves at once to mark the conflict of usage that then prevailed on the subject of contraband, and, incidentally, to justify the British and American view.

The Ensuing Controversy. On the 1st June, 1904, the British Government, after having elicited some further information as to the precise meaning and intent of the Russian list of contraband, addressed a protest to the Russian Government against the treatment of rice and provisions as unconditional contraband, on the ground that such a proceeding was inconsistent with the law and practice of nations. Such articles, it was contended, could only be treated as contraband where circumstances showed that they were destined for the military or naval use of the enemy; nor was the decision of a Prize Court of the captor in such a case binding on neutral States unless it was in accordance with the recognized rules and principles of international law (*f*). To this objection the Russian Government replied, in effect, that in the absence of any international decision as to what was or was not contraband, it rested with the belligerent to decide what articles were and what were not to be so regarded (*g*).

(*c*) Except in 10 only the heads are given; for the full text, see P. P. 1904, No. 3, incl.

(*d*) *Ibid.* No. 15, incl.

(*e*) *Supra*, p. 423.

(*f*) Lord Lansdowne to Sir C. Hardinge, 1st June, 1904. The Government of the United States made a similar protest, see Hershey, 167.

(*g*) Sir C. Hardinge to Lord Lansdowne, 8th June, 1904.

On the 10th August the British Government made a further protest against the indiscriminate molestation of neutral commerce to which the unwarrantable extension of the doctrine of contraband by Russia had given rise: especially when taken in conjunction with the claim to destroy neutral prizes when their conveyance to a Prize Court might be found inconvenient (*b*). It also pointed out that the Russian treatment of coal and fuel as contraband was diametrically opposed to the declaration which had been made by the Russian Plenipotentiary in 1884, on the occasion of the Berlin Conference, when it was stated that the Russian Government refused categorically to consent to any treaty or declaration which would imply the recognition of coal as contraband of war. It was impossible for the British Government to admit that coal and fuel of every kind were contraband irrespective of whether they were destined for the belligerent forces or not; or to admit that it was open to any Power to ignore the long-established distinction between absolute and conditional contraband and to include in the former category a number of articles in themselves innocent and largely dealt in by neutral Powers; or finally, to admit that the seizure of ships and cargoes by reason merely of their comprising such articles, and without proof of a military destination, was justifiable in international law. Hence all claims for compensation put forward by British subjects whose interests had suffered by the application of the Russian rules would receive the strenuous support of the British Government. The latter had no desire to place obstacles in the way of a belligerent desirous of taking reasonable precautions to prevent his enemy from receiving supplies; but it could not admit that this carried a right to intercept, at any distance from the scene of operations, and without proof of any military destination, any articles which a belligerent might determine to regard as contraband (*c*).

Meanwhile, the seizure and condemnation of American

(*b*) Lord Lansdowne to Sir C. Hardinge, P. P. *infra*, No. 20.

(*c*) Lord Lansdowne to Sir C. Hardinge, P. P. *infra*, No. 21. A complaint was also made to the Russian cruisers, in their search for contraband, discriminated unfairly against British shipping in favour of that of other States; a charge which was, after enquiry, disclaimed by the Russian Government. P. P. *supra*, Nos. 26, 27.

cargoes (*k*) provoked similar remonstrances on the part of the United States. In a despatch of the 30th August, 1904, which will probably rank as an authoritative utterance on this subject, Mr. Hay, the United States Secretary of State, pointed out that the true criteria for determining what constituted contraband were warlike nature, use, and destination; that these criteria had been arrived at by the common consent of civilized nations after centuries of struggle; and that the logical results of the Russian doctrine would be to destroy completely all neutral commerce with the non-combatant population of Japan, to obviate the necessity of blockades, and to obliterate all distinction between commerce in contraband and non-contraband goods (*l*). Hence it was contended that telegraphic, telephonic, and railway material were not confiscable merely because destined to the commercial ports of a belligerent; and that articles such as coal, cotton, and provisions were not subject to capture and confiscation unless shown to be actually destined for the military or naval forces of a belligerent. Nor could this substantive principle be allowed to be overridden by any technical rule of the Prize Courts that the owners of the cargo must prove that no part of it would eventually come into the hands of the enemy forces (*m*).

In view of these remonstrances, and also of certain pronouncements which had meanwhile been made by the Supreme Prize Court as to the necessity of recognizing a distinction between absolute and relative contraband (*n*), the Russian Government agreed to reconsider these questions, and ultimately referred them for report to a Commission presided over by Professor Martens (*o*). As the result of this report fresh instructions were issued to the Russian Prize Courts and naval commanders. By these the various articles mentioned in Article 6, sub-sect. 10, of the Regulations previously referred to (*p*), including rice and provisions (*q*), were recognized as being conditionally contraband; the distinction between absolute and conditional contraband being so far admitted

(*k*) *Ante*, p. 137.
(*l*) Hershey, 179 *et seq.*
(*m*) See *The Jonge Margaretha* (p. 426 *ante*), where this question is considered.
(*n*) In the cases of *The Arabic* and *The Hawke*, see p. 137-8, *ante*, and Westlake Jones, Commerce in War, 90.
(*o*) P. P. *supra*, Nos. 24, 26.
(*p*) *Supra*, p. 432.
(*q*) But not horses and beasts of burden.

by Russia. The effect of the new Regulations, after they had been subjected to some revision, was to exclude such articles from the category of contraband, unless consigned to the belligerent Government or its administration, or to its armed forces, fortresses, or naval ports. When consigned to individuals, they were not to be treated as contraband, except on proof by the captor that the consignees were really agents or contractors for the naval or military authorities. Nor were vessels carrying contraband to be liable to condemnation unless more than half the cargo was contraband (*r*). Notwithstanding these mitigations, however, coal was still retained as absolute contraband; nor was it found possible to obtain any redress or satisfaction on this point, beyond a general assurance that the Russian regulations in this regard would be construed liberally (*s*).

This controversy serves to illustrate the conflicting views that prevailed with respect to contraband, under the customary law, and the incidental difficulties and dangers. Owing to the lack of any settled rule, States were wont, on the outbreak of war, to issue an announcement as to what articles they proposed to treat as contraband. Russia, acting on this principle, included in her list of contraband—without regard to any distinction between absolute and conditional contraband—a variety of articles which, under the British and American practice, would only have been liable to seizure and condemnation when on a military destination. The effect of this was practically to interdict neutrals from carrying on trade in a number of important articles with the non-combatant population of Japan. Hence the British and American protests. The main points of the British contention were: (1) That there was an established distinction between absolute and conditional contraband which could not be ignored at the discretion of a belligerent; (2) that in any case food-stuffs could not, consistently with the law and practice of nations, be treated as contraband except on proof of direct destination for military or naval use; (3) that coal, although sufficiently essential for hostile purposes to justify a limitation or denial of its supply to belligerent warships in neutral ports, was at the same time so essential for the larger purposes of civil life as to preclude it from being treated as contraband except on similar proof of destination for military or naval use (*t*); and (4) that the decisions of belligerent Prize Courts in such matters must, in order to be binding on neutral States, be in accordance

(*r*) P. P. xxxix, Nos. 28–30, 39.
(*s*) This was in an earlier despatch of the 21st Sept.
(*t*) Sir C. Hardinge to Count Lamsdorff, 9th Oct.

with recognized principles of international law. The United States Government took up a similar position with respect to coal and cotton; pointing out (1) that according to the Russian contention, every article of human use might be declared contraband merely because they might ultimately and in some degree become useful to a belligerent for military purposes; and (2) that the treatment of coal and raw cotton as absolute contraband might ultimately lead to the total inhibition of the sale by neutrals to the people of belligerent States of all articles which could be finally converted to military uses (*u*).

The application in practice, moreover, of the Russian regulations to neutral shipping gave rise to much dissatisfaction. In June, 1904, the *Allanton*, a British steamer, which had carried Welsh coal to Japan on her outward voyage, was captured on her return voyage by a Russian squadron in the Straits of Korea whilst carrying Japanese coal from Muroran to Singapore. Both ship and cargo were condemned by the Prize Court at Vladivostock, on the ground that the ship had carried contraband on the outward voyage and that a combination of facts served also to show that at the time of capture she was really on a hostile destination. Of these it may be said that the former allegation, although true in fact, afforded no ground for condemnation, both because the voyage had been commenced before coal had been declared contraband, and because in any case the deposit of contraband terminates the liability of the vessel (*x*); whilst the latter conclusion was not borne out by the evidence. The decree of condemnation was, indeed, subsequently reversed on appeal to the Admiralty Council at St. Petersburg, although even that Court held the seizure to have been justifiable (*y*). In July, 1904, the *Knight Commander*, a British steamer then on a voyage from New York to Kobe and Yokohama with a mixed cargo, including flour, machinery, and a large quantity of railway material, was captured by a Russian cruiser about seventy miles from Yokohama. After a hurried examination the vessel was sunk on the ground that she was carrying contraband, and that the captors were unable, by reason of her proximity to an enemy port and lack of coal, to take her to Vladivostock. The legality of this proceeding was upheld both by the Vladivostock Prize Court and the Supreme Prize Court; although the protest of the British Government produced an assurance that no more neutral prizes would be sunk (*z*). The seizure, and the subsequent condemnation by the Vladivostock Court, of American flour and railway material found on the *Arabia*, a German vessel and consigned to Japanese ports, without proof that they

(*u*) Mr. Hay's Circular, 10th June, 1904; see Hershey, 168, 170 *et seq.*

(*x*) Nor was there any evidence of the use of false papers, which under the former British practice would have justified capture and condemnation on the return voyage; *supra*, p. 429.

(*y*) See Alberley Jones, Commerce in War, 81, where the judgment is set out.

(*z*) A claim for compensation by the British Government was rejected as regards the interests of the owners of the vessel, but admitted as regards the interests of owners of innocent cargo on board.

were intended for the use of the Japanese Government, provoked a similar remonstrance from the United States Government; and in the result both vessel and cargo were released by the higher Court (*a*). In the case of the *Calchas*, a British steamer, with a cargo consisting largely of American flour, raw cotton, timber and machinery, consigned in part to Japanese ports, both ship and cargo were seized and subsequently condemned by the same Court; but on appeal to the higher Court the ship herself was released, although only after long detention, whilst various portions of her cargo, including the cotton, were condemned (*b*).

Japan, on the other hand, both in the regulations issued by the Naval Department respecting contraband (*c*), and in the decisions of her Prize Courts, adhered in the main to the British and American practice (*d*). In the case of the *Aphrodite*, Cardiff coal, of a kind rarely used in the East except for naval purposes, and consigned to Vladivostock, a naval as well as a commercial port, was condemned: the penalty being extended to the vessel on the ground that the entire cargo was contraband and that a false destination had been given (*e*). In the case of the *Scotsman*, a cargo of rice bound for Vladivostock was condemned in circumstances tending to show that the latter was intended for the military forces of the enemy: the ship also being condemned on the ground that the whole cargo consisted of contraband and that the master was guilty of connivance (*f*). In the case of the *Tacoma*, a cargo of salt beef consigned to the Russo-Chinese Bank at Vladivostock, that bank being in intimate connection with the enemy Government, was condemned: the vessel sharing the same fate on the ground of connivance and the use of a false destination (*g*).

General Notes. *Contraband under the Customary Law.* Of all the restraints on neutral trade previously enumerated, that relating to contraband probably bears most hardly on neutrals. And yet it was precisely on this subject that the earlier usage was most lacking in certainty and uniformity. Apart from convention, the only points on which there was any general agreement were that the property in order to warrant its confiscation as contraband must be of a kind likely to assist the enemy in war, and must have a hostile destination: although even here little was settled except that articles of immediate use in war were always liable if taken on a direct destination to the enemy territory or forces

(*a*) See Hershey, 174.

(*b*) The judgment in this case, which is set out in Appendix I. to Ariga, Contraband in War, at pp. 78 *et seq.*, is noteworthy as embodying a decision on the meaning of "[illegible]" as used in a regulation similar in its terms to Art. 31 of the Declaration of London as to which see pp. 442 *et seq.* *infra*.

(*c*) These are contained in an Order of the 10th December, 1904: see Takahashi, 491 *et seq.*

(*d*) Although with some variations, *e.g.*, as regards the liability of the ship in the event of a certain proportion of the cargo being contraband.

(*e*) Takahashi, 651.

(*f*) *Ibid.*, 691.

(*g*) *Ibid.*, 701.

but the practical exigencies of war altogether precluded the limitation of contraband to arms and munitions of war; whilst as regards other articles there was a great lack of uniformity, not merely in the practice followed by different States or groups of States, but also in the practice followed by the same States at different times, this depending largely on their maritime strength when belligerent and their commercial interests when neutral. It was, indeed, attempted at various times and as between particular States to define contraband by treaty; but such treaties show a complete absence of that uniformity which is necessary to the formation of custom (*b*). Beyond this we find international declarations, such as those of the Armed Neutralities of 1780 and 1800; but these were really in the nature of hostile manifestoes and were not consistently adhered to even by the States that were parties to them. A body of consistent doctrine and practice with respect to 'contraband' was, indeed, gradually built up by the British and American Courts; but this was thought to incline too much to the belligerent interest, and was not at the time generally accepted or acquiesced in by other States. Outside this there was neither consistent theory nor harmonious practice. And this condition of things persisted down to quite recent times; with the result that it finally became evident that relief from the prevailing uncertainty, with its attendant hardships to neutrals and consequent danger of friction, was to be found only by way of international agreement. The subject of contraband of war was therefore included in the programme of the Hague Peace Conference of 1907; but beyond the discussion of a proposal made by Great Britain for the complete abolition of the doctrine of contraband, which was not in fact approved (*c*), and the framing of a proposed list of absolute contraband, which was not at the time adopted (*d*), no result was attained. At the Naval Conference of 1908-9, however, the settlement of the law of contraband was one of the foremost topics, and as the result of much discussion and compromise an agreement on the subject was finally arrived at, which is now embodied in the Declaration of London.

The Declaration of London: its Treatment of Contraband generally. With respect to contraband, the Declaration of London adopts definitely the distinction previously recognized under the British and American practice between 'absolute' and 'conditional' contraband; it then sets forth a list of articles to be included under each of these heads, as well as a list of non-contraband articles (*e*); it next

(*b*) See Hall, 637 *et seq.*; Westlake, ii. 241 *et seq.*

(*c*) This proposal met with so unfavourable a reception that it was not renewed on the occasion of the Naval Conference: see Parl. Papers, Misc. No. 4 (1909), p. 23. But a proposal for the abolition of conditional contraband, also previously suggested at the Peace Conference, was made by the British delegates, but withdrawn, *ib.* p. 99.

(*d*) Although largely adopted in the memoranda presented by the parties to the Naval Conference: see, by way of example, Parl. Papers, Misc. No. 5 (1909), p. 25 (Spain), p. 51 (Holland), and now incorporated in the Declaration of London: see p. 440 *infra*.

(*e*) Arts. 22–29.

prescribes with some minuteness the conditions of liability as regards both classes of contraband (*m*); it further defines the effect of the carriage of contraband on both the vessel and the non-contraband cargo (*n*); and, finally, it sanctions certain mitigating practices as regards the penalty for contraband (*o*). In this, as in other matters, the text is accompanied by a Report containing an explanatory comment, which will probably be accepted as authoritative.

(i.) *Absolute Contraband:* (1) *Objects.*—The term "contraband of war" connotes, as we have seen, two elements, one of which turns on the nature of the object, and the other on its destination. The distinction between "absolute" and "conditional" contraband, again, involves differences both as regards the nature of the objects included in these categories and the rules that govern their destination. As regards objects, under the Declaration of London the following articles may, without notice on the part of a belligerent (*p*), be treated as "absolute contraband": (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts; (2) projectiles, charges, and cartridges of all kinds, and their distinctive component parts; (3) powder and explosives specially prepared for use in war; (4) gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts; (5) clothing and equipment of a distinctly military character; (6) all kinds of harness of a distinctly military character; (7) saddle, draught, and pack animals suitable for use in war; (8) articles of camp equipment and their distinctive component parts; (9) armour plates; (10) warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war; and (11) implements and apparatus designed exclusively for the manufacture of munitions of war, or for the manufacture or repair of arms or war material for use on land or sea (*q*). This list, it will be seen, includes nearly every object that is exclusively used for war; as well as some objects, such as horses, which are also used in peace, and which under the British practice would be treated only as conditional contraband. In view, moreover, of possible new discoveries and inventions, it is provided that articles exclusively used for war may be added to this list by declaration on the part of a belligerent; but such declaration must be notified to the other Powers or their representatives, or, if made after the outbreak of hostilities, then to neutral Powers (*r*). The legality of such additions may, of course, be challenged either by diplomatic methods, or before the International Court if that Court should be established (*s*). A belligerent may, however, if he thinks fit, waive his right to treat any of these articles as contraband, or may relegate them to the category of conditional contraband, subject to a like declaration and notification (*t*).

(*m*) Arts. 29–36, 39.
(*n*) Arts. 37–42.
(*o*) Arts. 43, 44.
(*p*) *Irrefragable droit.*
(*q*) Art. 22.
(*r*) Art. 23.
(*s*) See Report, Pearce Higgins, 583.
(*t*) Art. 26.

(2) *Destination and Proof.* In the matter of destination, absolute contraband is liable to capture if destined either to territory belonging to or occupied by the enemy, or to the armed forces of the enemy, and this whether directly or by transhipment, or by subsequent land transport (*a*). In this case it is not the destination of the vessel which is decisive, but that of the goods. Even if the vessel herself is genuinely bound for a neutral port and the goods are to be discharged there, the latter will be liable if the captor can show that they are ultimately destined for the enemy country; the transport being regarded as a whole. This, it will be seen, imports into the law of contraband, although only so far as relates to absolute contraband, the "doctrine of continuous voyages" described hereafter (*b*). The onus of proof as regards destination will lie on the captor. But such proof will be deemed to be forthcoming and even conclusive, if it is shown (1) that the goods are documented for discharge at an enemy port (*c*), or for delivery to his armed forces; or (2) that the vessel is to call at enemy ports only, or to touch at an enemy port or to meet his armed forces before reaching the neutral port for which such goods are documented (*d*). The ship's papers (*e*) are, however, to be taken as conclusive with respect to her destination, unless she is found clearly out of the course indicated by them and is unable satisfactorily to account for such deviation (*f*), or unless her papers are palpably false (*g*).

(ii.) *Conditional Contraband:* (1) *Objects.* The following articles, which are susceptible of use in war as well as in peace, may without notice or declaration be treated as "conditional contraband," subject to their having a special destination to military use in the sense indicated hereafter (*h*): (1) Food stuffs, including all products, whether solid or liquid, used for human sustenance; (2) forage and grain suitable for feeding animals; (3) clothing, fabrics for clothing, and boots and shoes, suitable for use in war; (4) gold and silver in coin or bullion, paper money (*i*); (5) vehicles of all kinds available for use in war, and their component parts; (6) vessels, craft, and boats of all kinds, floating docks, parts of docks, and their component parts (*k*); (7) railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs, and telephones; (8) balloons and flying machines and their component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines; (9) fuel and lubricants; (10) powder and explosives not specially prepared for use in war; (11) barbed wire, and implements for fixing and cutting the same; (12) horse shoes and shoeing materials; (13) harness and saddlery;

(*a*) Art. 30.

(*b*) *Infra*, pp. 467, 472.

(*c*) Or one occupied by him.

(*d*) See Art. 31; and as to the British practice, p. 429, *supra*.

(*e*) See vol. i. 275.

(*f*) Art. 32.

(*g*) See Report, Pearce Higgins, 587, 5-9.

(*h*) *Infra*, p. 442.

(*i*) This includes banknotes, but not bills of exchange or cheques.

(*k*) Excluding boilers.

and (14) field glasses, telescopes, chronometers, and all kinds of nautical instruments (*g*). Articles susceptible of use in war, and not included in either list, may also be added to this list by declaration and notice (*h*), whilst articles now included in it may, at the discretion of a belligerent, be excluded, subject to the like conditions (*i*).

(2) *Destination and Proof.* Conditional contraband is only liable if shown to be destined either (1) for the armed forces of the enemy; or (2) a Government department of the enemy State (*k*), the ground of liability in the latter case being that such articles may readily be applied to military uses and will in any case serve to increase the immediate resources of the enemy State. But local and municipal bodies will not rank for this purpose as departments of State. Even where conditional contraband, moreover, is destined for a Government department, the presumption of military use may be rebutted by proof that it cannot really be used for the purposes of war, as where foodstuffs are consigned to the civil Government of an enemy colony; although no such disproof is admissible in the case of coin, bullion, or paper money (*l*). In view, however, of the fact that contraband would not usually be consigned directly to the military authorities or to Government departments of the enemy, it is provided that such a destination shall be presumed if the articles in question are consigned (1) to enemy officials (*m*); or (2) to a contractor established in the enemy country who notoriously supplies articles of this kind to the enemy (*n*); or (3) to a fortified place belonging to the enemy, or to any other place that serves as a base of operations (*o*). But all these presumptions may be rebutted. Nor will any such presumption arise as regards a merchant vessel bound to any such place in the case where it is sought to prove that she herself is contraband. In all other cases there will be a presumption of innocent destination, which it will rest with the captor to disprove; whilst seizure will afford ground for indemnity unless there was reasonable cause for suspicion (*p*). As regards the effect of these provisions, it would seem that, but for certain ambiguities arising out of the terms used, they do not differ substantially from the corresponding rules that obtain under the British practice. This,

(*g*) Art. 24.

(*h*) Art. 25; and p. 440, *supra*.

(*i*) Art. 26; and p. 440, *supra*.

(*k*) Art. 33.

(*l*) Art. 33, and Report, see Pearce Higgins, 587.

(*m*) The term used in the original is *autorités ennemies*.

(*n*) The original runs thus: *ou commerçant établi en pays ennemi lorsqu'il est notoire que le commerçant fournit à l'ennemi des objets et matières de cette nature*. The term *ennemi*, although otherwise ambiguous, can, it read in the light of the Arts. 33 and 34 and of the Report, only be interpreted as meaning "enemy government" and not "enemy individuals"; see Parl. Papers, Misc. No. 5 (1909), 358; Pearce Higgins, 551, n.; and for a like interpretation of the same term by the Russian Courts in the case of *The Calchas*, p. 438, n. (*b*), *supra*.

(*o*) The term used in the original is *autre place servant de base aux forces armées ennemies*.

(*p*) Arts. 34, 64; and *supra*, p. 431 n. (*b*).

as we have seen, treats destination to military use as the general test of the liability of conditional contraband; and presumes this from any destination to the enemy Government, or to a place of naval or military equipment (*q*). Some ambiguity, however, is said to attach to the term "enemy" as used in the expression "a contractor who notoriously supplies articles of this kind to the enemy"; although for the reasons already noted (*r*) it is scarcely conceivable that this could be interpreted as meaning aught else than the "enemy Government." An ambiguity of a more serious kind, however, attaches to the term "place serving as a base of operations" (*s*). This, although probably meant to stand for a place of naval or military equipment where armed forces of either kind are collected, prepared, and despatched, might—and by a belligerent probably would—be interpreted as meaning a "base of supply," in which case it would cover all ports and cities from which supplies were obtained for the use of military or naval forces (*t*). The risks incident to this ambiguity might, however, be avoided, if it were possible to arrive at a common understanding on this point prior to ratification. Finally, the Declaration provides that conditional contraband shall not be liable to capture except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy; and even then not if it is to be discharged at an intervening neutral port; the ship's papers being conclusive on both points, except where she is found clearly out of the course indicated by her papers and is unable to account for this satisfactorily (*u*). In the case, however, where the enemy country has no seaboard (*x*), articles included under conditional contraband may be seized and condemned even though bound immediately for a neutral port, if shown to be destined for the use of the armed force or a Government department of the enemy (*y*). But in any other case "the doctrine of continuous voyages" is wholly excluded as regards conditional contraband; whilst in order to guard against unjustifiable interference with neutral vessels on this ground, the ship's papers are to be taken as conclusive proof of destination, unless the facts show that evidence to be false (*z*).

(iii.) *Non-Contraband.* Articles which are not susceptible of use in war may not be declared contraband (*a*). In particular—but without derogating from the generality of this rule—the following articles are declared to be non-contraband: (1) Raw cotton, wool, silk, jute, flax, hemp, and other materials of the textile industries,

(*q*) See p. 427.

(*r*) See p. 442, n. (*r*).

(*s*) See p. 442, n. (*s*).

(*t*) See Bentwich, Declaration of London, 73.

(*u*) Art. 35. The Report adds: "where a search of the vessel shows that the papers state the destination falsely": see Pearce Higgins, 552, n., 589.

(*x*) As in the case of the former South African Republic and Orange Free State.

(*y*) Arts. 33, 36.

(*z*) See p. 442, n. (*z*).

(*a*) Art. 27.

and yarns of the same; (2) oil, seeds and nuts, copra; (3) rubber, resins, gums and lacs, hops; (4) raw hides, horns, bones and ivory; (5) natural and artificial manures, including nitrates and phosphates for agricultural purposes; (6) metallic ores; (7) earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles; (8) chinaware and glass; (9) paper and paper making materials; (10) soap, paint and colours, including articles exclusively used in their manufacture, and varnish; (11) bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia and sulphate of copper; (12) agricultural, mining, textile and printing machinery; (13) precious and semi-precious stones, pearls, mother-of-pearl and coral; (14) clocks and watches, other than chronometers; (15) fashion and fancy goods; (16) feathers of all kinds, hairs and bristles; (17) articles of household furniture and decoration, office furniture and requisites (*b*). To these are added, on grounds of humanity—(1) articles serving exclusively to aid the sick and wounded, including drugs and medicines, although these, if they have an enemy destination, may in case of urgent military necessity be requisitioned for use subject to the payment of compensation (*d*); and (2) articles intended for the use of the vessel in which they are found, or for the use of her crew and passengers during the voyage (*e*). The articles included in the list of non-contraband include, it will be seen, the raw material of the more important industries. It has also the advantage of securing beyond possibility of dispute that such articles can never be declared contraband under the power reserved to the belligerents of adding to the previous lists (*f*).

The Limits of Capture. A vessel which is carrying contraband may be captured on the high seas, or in the territorial waters of either belligerent, throughout the whole of her voyage, even though she is to touch at a port of call before reaching the hostile destination (*g*), so long as there is a hostile destination of the kind required for the class of contraband carried (*h*). But a vessel cannot be captured on the ground of having previously carried contraband, if the contraband has once been deposited (*i*). These provisions again are in accordance with the present British practice (*k*).

The Question of Notice. In general it may be said that in order to involve neutrals in liability there must be both notice of the war (*l*), and notice of the contraband character of the goods carried. As to the articles comprised in the lists previously mentioned, the Declaration itself will be standing notice of their contraband character; whilst as to any articles added thereto provision is made, as we have seen, for the issue of a special declaration and notifica-

(*b*) Art. 28.
(*d*) As to hospital ships proper and their equipment, see p. 422-3, *supra*.
(*e*) Art. 29.
(*f*) *Supra*, pp. 440, 442.
(*g*) Art. 37.
(*h*) *Supra*, pp. 441, 442.
(*i*) Art. 38; and p. 429, *supra*.
(*k*) *Supra*, p. 429.
(*l*) *Supra*, p. 287.

tion (*m*). To meet the case where contraband is found on a vessel which is ignorant either of the outbreak of hostilities or of some special declaration adding to or altering the existing lists (*n*), or which on becoming aware of these facts had no opportunity of discharging the contraband, it is provided that in such a case the contraband part of the cargo shall not be condemned except on payment of compensation, the vessel and the remaining cargo being not only exempt from confiscation but free from any liability to costs and expenses that might otherwise be imposed (*o*). This gives the belligerent, as regards such part of the cargo as may prove to be contraband, a right of pre-emption, which would presumably be exercised on the same lines as those observed under the British practice previously referred to (*p*). But no vessel can claim to be unaware of the existence of the war if she left a neutral port after the fact of war had been notified to the territorial Power, provided the notification was made in sufficient time; or if she left an enemy port after hostilities had actually begun (*q*). Nor can she claim to be unaware of any special declaration of contraband (*r*) if she left a neutral port after its notification to the territorial Power, provided again the notification was made in sufficient time (*s*).

The Penalty for carrying Contraband. The contraband itself is, of course, liable to condemnation (*t*). With respect to the effect of the carriage of contraband on the ship, and on innocent cargo, the Declaration provides: (1) That the vessel herself shall be liable to condemnation if the contraband on board amounts to more than one-half of the cargo, this whether reckoned by value, weight, volume, or freight (*u*); such a proportion of contraband being regarded as proof of the ship's complicity in the contraband venture. (2) That in any other case the ship shall go free; although with a view to discourage contraband traffic she may, in addition to the loss incident to detention and delay, be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Court and the custody of both ship and cargo (*v*). (3) That all goods belonging to the owner of the contraband, even though otherwise innocent, shall also be liable to condemnation (*w*). This involves a material alteration in the British and American practice as regards the circumstances under which the vessel herself is liable to condemnation (*x*); but the rule is in itself not unfair, and will, if the Declaration should be generally accepted, have the advantage of establishing a uniform practice.

The Seizure of Contraband. In alleged relief of neutrals it is provided that where a neutral vessel is stopped for carrying contraband, the amount of which is not such as to involve the vessel her-

(*m*) Art. 39, pp. 440, 442 *supra*.
(*n*) Art. 40.
(*o*) Art. 43.
(*p*) See p. 427 *supra*.
(*q*) Art. 43.
(*r*) See p. 444 *supra*.
(*s*) Art. 43.
(*t*) Art. 39.
(*u*) Art. 40.
(*v*) Art. 41.
(*w*) Art. 42.
(*x*) See p. 431 *supra*.

self, she may, if circumstances permit, be allowed to continue her voyage on handing over the contraband to the belligerent, together with all relevant papers; such delivery being entered in the log-book of the vessel stopped; and the captor being at liberty to destroy the contraband if he thinks fit (*a*). Such a proceeding, it was thought, although not warranted by prior usage, might prove mutually advantageous where the contraband was small in value and amount; but it is voluntary on either side, and in any case the seizure of the contraband must be passed upon by the Prize Court of the captor (*b*).

The Export of Contraband. The export of contraband, even though in the way of trade, has sometimes been made a subject of complaint on the part of belligerents as against a neutral State. So, during the civil war, the United States complained of the refusal of the British Government to put a stop to contraband traffic between British ports and those of the Southern Confederacy (*c*). In 1870, Prussia also complained of the action of the British Government in allowing the sale and export by English firms of arms and ammunition to France (*d*). In 1904, again, Russia appears to have questioned the legality of British trade in contraband with Japan (*e*). It is true that most States, including Great Britain, warn their subjects of the penalties incident to contraband traffic (*f*); that some States even go so far as to prohibit the export of contraband from their territory (*g*); and, finally, that some writers are of opinion that a duty should be imposed on neutral Governments of preventing the export of contraband by their subjects (*h*). But so far there is, as we have seen (*i*), no duty on the part of neutral States to restrain contraband traffic (*k*), unless it involves a use of neutral territory for the preparation of an instrumentality of war (*l*), or a direct participation in some specific operation of war (*m*). It was on the latter ground, no doubt, that the British Government in 1870, whilst refusing to interfere with the export of coal to France generally, yet prohibited its export from British ports to the French fleet in the North Sea (*n*). But in such cases the export of contraband is really

(*a*) Art. 44.

(*b*) See Report, Pearce Higgins, 592.

(*c*) Moore, Int. Arb. i. 619.

(*d*) Hall, 656.

(*e*) Hershey, 183 *et seq.*

(*f*) See p. 373.

(*g*) Brazil and the Netherlands, for instance, in 1898, and Sweden in 1904; although the scope of the prohibition is not Westlake, ii. 258.

(*h*) For a suggested scheme of neutral control over contraband traffic, see Barclay, Problems, 160 *et seq.*

See p. 284.

(*k*) As is, indeed, now fully recognized by the Hague Convention, No. 13 of 1907; see Art. 7, and p. 259, *ante*.

(*l*) As where an armed vessel is despatched with intent to engage in the service of either belligerent; see p. 343.

(*m*) As where coal is exported for the use of a belligerent fleet operating in adjoining waters.

(*n*) See Hall, 656; and as to the British amended regulations on this subject in 1904, p. 374, *post*. Shipping coal to a belligerent fleet would also render the shippers liable to be proceeded against under the Foreign Enlistment Act, 1870, ss. 8 and 30; whilst a neutral ship engaged in transporting coal would be liable to capture and condemnation by the other belligerent as for on neutral service; see p. 451, *ante*.

incident to another kind of illegality, which is governed by separate and independent rules (*o*).

UNNEUTRAL SERVICE (*a*).

(i) THE CARRIAGE OF NAVAL OR MILITARY PERSONS.

THE "OROZEMBO."

[1807: 6 C. Rob. 430.]

Case. In 1807, during war between Great Britain and Holland, the "Orozembo," an American ship, was chartered by a merchant at Lisbon, ostensibly, to proceed in ballast to Macao and thence to take a cargo to America. Afterwards, by direction of the charterer, three military officers of distinction and also two persons employed in the civil departments of the Government of Batavia—who had come from Holland to take passage to Batavia by direction of the Dutch Government—were received on board, together with their attendants, the vessel having been specially fitted for their reception. In the course of her voyage she was captured by the British and sent in for adjudication. Condemnation of the vessel was prayed for, on the ground that she had been employed at the time of capture in the service of the enemy and for the purpose of transporting military persons to enemy territory. On behalf of the owner, it was contended that the master was ignorant of the service in which he was engaged, and that in order to warrant condemnation there must be some proof of delinquency in him or the owner. In the result, the vessel was condemned as having been let out in the service of the Dutch Government.

(*o*) See, *e.g.*, pp. 318, 343. In English law the Government possesses statutory powers of forbidding the export of warlike material: see the Customs Consolidation Act, 1853, s. 150, although this is usually a measure of self-protection.

(*o*) The forms of unneutral service here described are sometimes treated of under the head of analogues of contraband, see Hall, 674; but the analogy is not very clear, the hostile association being in some cases more, and in other cases less, close than that involved in contraband carriage.

Judgment. Sir W. Scott, in his judgment, after referring to the facts, said that it had already been held that a vessel hired by the enemy for the conveyance of military persons was to be considered as a transport and as subject to condemnation. It might be difficult to define precisely the number of military persons required to involve a vessel in guilt. But on the whole he agreed with what had been said in argument, that in view of the principle on which the law was built up number alone was not material. It might, for instance, be of much more assistance to one belligerent, and much more noxious to the other, to carry a few persons of higher quality than a much greater number of lower condition; and it was the consequences of such assistance that the belligerent was entitled to prevent and punish. In the present case there were three military persons, as well as two civil officers. Whether the same principle applied to the latter he was not then called upon to determine; but on principle it appeared reasonable that wherever it was of sufficient importance to the enemy that such persons should be sent out on the public service at the public expense it should afford ground of forfeiture against the vessel let for a purpose so intimately connected with hostile operations. As to the contention that there must be some proof of knowledge or delinquency on the part of the master in order to involve the vessel, that was not essential. It was sufficient if there was an injury arising to the belligerent from the employment in which the vessel was found; and if the service was injurious, it gave the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. Moreover, the knowledge or privity of the owner or those employed to act for him would be just as effectual as that of the master; and, in the present case, the evidence appeared to justify the supposition that the owner, or those acting for him, knew of the nature of the transaction. At the same time, the principle on which he decided the case was that the carrying of military persons to a colony of the enemy, there to exercise their military functions, was in itself a cause of condemnation, without scanning too minutely the number of persons so carried; and that the ignorance of the master was no ground of exculpation.

According to the British practice (*b*), a neutral vessel, which is employed by one belligerent to carry combatants or intending combatants for purposes connected with the war, is liable to capture and condemnation by the other, together with her cargo: and this whether the number carried comprises only a few individuals, so long as their carriage is a service of State (*c*), or an entire detachment (*d*). Nor will it make any difference that the master was ignorant of the true character of such employment, so long as it was an actual engagement in the enemy service, whether exclusive or partial (*e*); or even that the employment originated in acts of violence or duress on the part of the other belligerent (*f*). And the same rule would probably apply where a neutral vessel was employed to carry even civil officers, if they were despatched on the public service and at the public expense (*g*). But such a liability would not, it seems, attach where the persons in question, even though having a military character, were merely travelling in the ordinary way and as private passengers at their own expense (*h*). The practice of the United States on these points appears to be substantially the same as the British (*k*). Similar rules were enforced also by Japan during the Russo-Japanese war, 1904-5. So, in the case of the *Nigretia*, a British vessel captured by the Japanese in 1904 whilst on a voyage from Shanghai to Vladivostock both ship and cargo were condemned on the ground that the vessel had on board two Russian officers who had recently been released from China on parole, but who were then proceeding to a naval port of the enemy, and travelling with the connivance of the charterers under feigned names and under pretence of being in the service of the vessel (*m*). In the *Yangtsze Insurance Association* v. *The Indemnity Marine Mutual Assurance Co.*, (1908, 1 K. B. 910; 2 K. B. 501), however, it was held by the Privy Council in a suit on a policy of insurance relating to this vessel, although only as a matter of construction, that the carriage of such persons did not amount to a breach of a warranty against contraband of war contained in the policy, for the reason that "contraband" in its natural sense, and in the absence of special circumstances or something in the text pointing to a wider meaning, only applied to goods and not to persons.

(*b*) See the British Memorandum, p. 9.

(*c*) *The Orozembo*, *ubi supra*, p. 148; *The Trent*, 6 C. Rob. 420). In this case a neutral vessel, which had been employed to carry back to France a large number of shipwrecked officers and men belonging to the French navy, was held liable to condemnation as an enemy transport.

(*d*) *The Orozembo*, *ubi supra*, p. 148; *The Carolina*, 4 C. Rob. 256).

(*e*) Per Lord Stowell in *The Orozembo*, p. 148, *supra*.

(*f*) See the British Memorandum, p. 9; and dictum of Lord Stowell in *The Trent*, 6 C. Rob. at 429).

(*g*) See Wheaton (Dana), 637 *et seq.*

(*h*) Takahashi, 639. As to the practice of other States, both of this and allied topics, see Parl. Papers, Miss. No. 5 (1909), 103–107.

(ii) THE TRANSMISSION OF INTELLIGENCE.

(a) DESPATCHES.

THE "ATALANTA."

[1808: 6 C. Rob. 440.]

Case. In 1847, during war between Great Britain and France, the "Atalanta," a neutral ship, was captured whilst on a voyage from Batavia to Bremen. It appeared that at the Isle of France, a French possession at which the vessel had previously called, a packet containing despatches from the local authorities to the French Minister of Marine had been taken on board. These despatches were subsequently discovered by the captors concealed in a tea chest, which was itself deposited in a trunk belonging to the second supercargo. In these circumstances both ship and cargo were condemned, on the ground that the carrying of despatches for a belligerent by a neutral ship places the ship in the service of the former.

Judgment. Sir W. Scott, in his judgment, observed that he was not called upon to decide what might be the consequences of a simple transmission of despatches, for the reason that the present case was a fraudulent one. But even the simple carrying of despatches for the enemy was a service highly injurious to the other belligerent. And this was so, even though such despatches related to operations not strictly military, for the reason that even civil operations might have an important bearing on the issue of the war. The consequences of the carriage of despatches were indeed far more serious than the carriage of contraband, for in them there might be conveyed the entire plan of campaign. After referring to the authorities the learned judge came to the conclusion that the carrying of despatches for the enemy warranted the confiscation of the vessel. It was true that in ordinary cases of contraband the ship incurred no penalty but loss of freight, but inasmuch as despatches carried no freight it would be ridiculous to treat the mere confiscation of the despatches themselves as sufficient penalty. Hence it was

necessary to resort to further measures, which could be no other than the confiscation of the ship. With respect to the liability of the cargo, it appeared in the present case that the offence was as much the act of those who were the agents of the cargo as of the master of the vessel; and for this reason the decree of condemnation must also extend to the cargo.

According to the British practice, the carriage by a neutral vessel of enemy despatches relating directly or indirectly to the operations of war, either with the privity of the master or other persons responsible for the action of the vessel or under circumstances of fraud or concealment, renders the vessel liable to condemnation; and this penalty will extend also to the cargo in a case where the latter belongs to the same owners, or where there is evidence of complicity on the part of the owners or their agents. But the penalty will not attach in a case where the master was ignorant either of the fact that despatches were being carried (*a*), or of their true character (*b*). Nor will any liability be incurred by the carriage of despatches from an enemy ambassador or consul in a neutral country to his Government (*c*); or even from the enemy Government to an ambassador or consul in a neutral country (*d*); for the reason that such despatches are necessary in the interests of the neutral and cannot be presumed to have a belligerent object. Nor, finally, would any such liability now be incurred by the carriage of despatches in the ordinary way of post; postal correspondence, whether found on board neutral or enemy ships, being declared to be inviolable by the Hague Convention, No. 11 of 1907 (*e*).

L. MESSAGES AND SIGNALS.

THE CASE OF THE "HAIMUN."

1904, Takahashi, 387 [illegible]; Lawrence, War and Neutrality, 83 [illegible]; Hershey, 116 [illegible]; Smith v. Sibley, 82 [illegible].

Case. In 1904, during the Russo-Japanese war, the steamship "Haimun," flying the British flag, was chartered by a British [illegible] equipped with special apparatus, and thereafter

[illegible] 124 Law. 224.
[illegible] Acts, 1, 2, and p. 174, [illegible] respecting a dissertation on [illegible] of [illegible]
[illegible] 1904, published by the U. S. Naval College.

employed, within the area of belligerent operations, for the purpose of procuring and forwarding information with respect to the war. This information was sent from the vessel by wireless telegraphy to a receiving station at Wei-ha-wei, and thence telegraphed to *The Times* of London and *The New York Times* over neutral cables. The correspondent in question was accredited to the Japanese headquarters and subject to all consequent restrictions. The "Haimun" was at different times visited and searched by the warships of each of the belligerents, and in particular by the Russian cruiser "Bayan," which appears to have made a careful examination of the apparatus on board. The apparatus used was capable not only of sending messages, but also of intercepting messages sent by either belligerent: and, even though such messages would ordinarily be in cipher, the information so obtained might, if improperly used, have materially influenced the conduct of hostilities (*a*). In these circumstances, on the 15th of April, an official note was addressed by the Russian Government both to Great Britain, the United States, and other Powers, containing the following intimation:—"In case neutral vessels, having on board correspondents, who may communicate news to the enemy by means of improved apparatus not yet provided for by the existing conventions, should be arrested off Kwan-tung, or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prize." Both Great Britain and the United States, however, refused to accept this declaration as being in conformity with the existing law: and made a formal reservation of their rights, in the event of their subjects or citizens being arrested or their vessels seized under this declaration. In the result, no further action was taken in the matter by Russia. But Japan shortly afterwards forbad the "Haimun" to proceed north of a line drawn between Chefoo and Chemulpo.

(*a*) The claim to treat the transmission of such messages as espionage was clearly indefensible. Nor, by existing usage, could exception be taken to the transmission of wireless messages from the Ligi-

See Hall, 547.

Supra, p. 451; and *Infra*, p. 460.

seas to neutral territory and thence by ordinary channels to some other neutral destination; although in future naval wars the transmission of such messages from any point within the area of belligerent operations may conceivably be subjected to restrictions akin to those imposed in war on land (*c*). But if it had been shown that information gained by the interception of messages had been communicated by those on board the *Haimun* directly to the enemy, this would have been a hostile act, which would have justified the condemnation of both vessel and her apparatus (*d*). So, during the same war, the *Industrie(e)*, a German vessel, was captured and condemned by the Japanese, on the ground that, although purporting to be engaged in collecting war news for a newspaper at Chefoo, she was really employed in watching the movements of the Japanese fleet and conveying military information in the interest of the enemy. The various questions that may arise, in war, in connection with the use of wireless telegraphy will be considered hereafter (*f*).

(iii) ENLISTMENT IN THE ENEMY SERVICE.

THE CASE OF THE "QUANG-NAM."

[1905: Takahashi, Cases, 735.]

Case. In 1905, during the Russo-Japanese war, the "Quang-nam," a steamship belonging to a French company, shipped, at Saigon, a cargo of spirits, which she subsequently delivered to the Russian squadron lying at Kamranh Bay. After leaving the latter place she proceeded nominally on a voyage to Manilla, without cargo, but in fact shaped her course between Formosa and the Pescadores, after which she ran into Hatto Channel, where she was captured by a Japanese cruiser, and sent in for adjudication. It appeared that the course pursued by the vessel was such as would enable those on board to obtain information both as to the coastal defences of Japan and the movements of the Japanese fleet; whilst there was also evidence that she had been supplied at Saigon with coal from the Russian depôt. In view of these facts the vessel was condemned.

Judgment. It was held by the Sasebo Prize Court, and afterwards by the Court of Appeal, that these facts went to show

(*c*) *Infra*, p. 460.
(*d*) *Infra*, p. 457-8.
(*e*) Takahashi, 732.
(*f*) *Infra*, p. 459.

that the vessel had been chartered by the Russian Government, and that she had been employed in the enemy service, both in carrying supplies to his fleet and in reconnoitring on his behalf, all of which, according to the rules of international law, justified her condemnation.

According to the British practice, which was here followed by the Japanese Courts, where a neutral vessel is chartered or exclusively employed by the enemy Government for service connected with the war, as for carrying coal or stores to its fleet, or is under the orders or control of that Government or its officers, both vessel and cargo will be liable to condemnation (*a*). Such a vessel will also remain liable to condemnation, even though the service on which she was immediately employed has come to an end, so long as it is shown that she still remains subservient to the purposes of the belligerent (*b*). A neutral vessel which is in the service of the belligerent and under his orders and control, may, if found taking part in any military operations or in the immediate vicinity of the enemy fleet, be sunk (*c*).

THE SEIZURE OF ENEMY PERSONS ON NEUTRAL VESSELS.

THE CASE OF THE "TRENT."

[1862; Parl. Papers, vol. lxii.; Wheaton (Dana), 641 *et seq.*]

Case.] In 1861, during the American civil war, the "Trent," a British mail steamer, was on a voyage from Havanna to Nassau with mails and passengers. Amongst the passengers were Messrs. Mason and Slidell, who were proceeding as envoys from the Southern Confederacy to Great Britain and France. When about nine miles from the coast of Cuba, the "Trent" was boarded by the United States warship "San Jacinto"; and, notwithstanding the protest of the British commander, Messrs. Mason and Slidell and their suite were taken out of the "Trent" and carried in the "San Jacinto" as prisoners to the United States. When these

(*a*) See *The Rebecca*, 2 Acton, 119; p. 9; and, as to the effect of non-
(*b*) *The Cagliari*, 4 C. Rob. 256. submission, *The Kwanshin*, 1904,
(*c*) See the British Memorandum, p. 285.

facts became known, the British Government made a peremptory demand for the immediate release of the persons seized and for an apology for their capture. In view of this demand, in making which Great Britain had the support of other Powers (*a*), the United States Government undertook at once to release the prisoners, who were soon after placed by arrangement on board a British warship, and conveyed to Nassau, their original destination.

Controversy. In the correspondence which ensued on this subject, the United States Government repudiated at the outset any claim of right to take noxious persons, whether rebels, criminals, or enemies, as such, from a neutral vessel on the high seas. It was contended, however, that Messrs. Mason and Slidell and their despatches were to be regarded as contraband of war, and on the same footing as naval and military persons (*b*); and that this being so, and the captain of the "San Jacinto" having ascertained in the course of visit and search that the "Trent" was carrying contraband, it was his right and duty to make the vessel prize and send her in for adjudication, although the fate of persons on board would require to be settled by diplomatic methods (*c*). At the same time it was admitted that the captain of the "San Jacinto," in releasing the vessel, whether out of consideration for the passengers and mails or from want of force to bring in both vessels (*d*), had taken a step which made the detention of Messrs. Mason and Slidell unjustifiable, and they would therefore be liberated. In reply to this despatch the British Government (*e*) pointed out that the office and character of the persons detained were not such as to make them

including France, Austria, Prussia, Italy, and Russia.

(*a*) In support of this view reference was made to Vattel, who allows that a belligerent may hinder his enemy "from sending ministers to sell it assistance"; and also to certain passages contained in the judgments in *The Caroline* and *The Orozembo*, as to which see *ante*, p. 156, n. (*c*).

(*b*) The difficulty as to this was that if the persons in question had really been on the footing of contraband, the Courts would have had a right to deal with them which, admittedly, was not the case.

(*c*) The latter was apparently the true reason; the captain and crew of *The Trent* having in fact refused to assist in working the vessel, if captured.

(*d*) After the release, but in order to guard against being supposed to acquiesce in the American contention,

contraband, for the reason that neutral States had admittedly a right to maintain friendly relations in time of war with both belligerents, and that, in view of the recognition of the belligerency of the Confederacy, neutrals must be deemed to have similar interest in the maintenance of communication with that body, and a consequent right to carry its public agents, not having a military character, without any breach of neutrality (*f*); and, further, that no authority could be found giving countenance to the proposition that persons and despatches, when in a neutral vessel and on a voyage to a neutral port, could ever be seized as contraband (*g*).

Alike in its vindication of the right of neutrals to maintain communication with and even to carry the public agents of an acknowledged belligerent; and in its contention that the carriage by a neutral vessel even of enemy persons or despatches on a genuine neutral destination could not be treated as a carriage of contraband (*h*), the British statement appears to accord with the existing law (*i*). It was further recognized by both parties, that, under the law as it then obtained, a public vessel had no right to seize and remove noxious persons, whether enemies or rebels, found on board a neutral vessel; although at the present time the seizure and removal from neutral vessels of persons belonging to the armed forces of the enemy is, as we shall see, under certain circumstances sanctioned by Convention (*k*).

General Notes. *Unneutral and Hostile Service.* By the Declaration of London, 1909, cases of unneutral service are divided into two classes, according to the gravity of the acts charged. These, for the purposes of distinction, we may conveniently designate as "unneutral" and "hostile" service respectively (*m*). The first covers cases in which the service is only partial; as where a neutral vessel is engaged to carry military persons or despatches concurrently with other employment of an innocent character. In such cases the vessel in question is to be treated in the same manner as

(*f*) It was also pointed out that the dictum of Sir W. Scott in *The Caledonia*, *supra*, pp. 451, n. (*a*), 455) had no reference to the case of an ambassador to a neutral State on board a neutral vessel; and that the case of *The Orozembo*, *supra*, p. 447) was altogether distinct as she was virtually found to have been engaged as an enemy transport.

(*g*) See Letters of Historicus, 187–198.

(*h*) The contention in the case of the *Trent* that the object of the mission rendered the destination hostile was, on the face of it, untenable.

(*i*) See Hall, 685.

(*k*) *Infra*, p. 458.

(*m*) Although the Declaration itself includes both under "Assistance hostile".

a neutral vessel engaged in the carriage of contraband. In effect, she becomes liable to seizure, and on proof of guilt, to condemnation; but she still retains her character as a neutral vessel, with the result that the flag will cover enemy goods on board, and that she cannot be destroyed except in circumstances that will ordinarily justify the destruction of a neutral prize, and with the like consequences (*x*); whilst, as in cases of contraband, her liability will end with the completion of the service. The second covers cases where the employment or engagement in the enemy service is complete and exclusive; as where a neutral vessel is chartered for enemy transport or other similar service. In such cases the vessel in question is to be treated as an enemy vessel. In effect, she not only becomes liable to condemnation on proof of guilt, but her flag will no longer be deemed to cover the goods on board, which will be presumed to be enemy property (*o*); whilst she may also be destroyed under the same conditions as an enemy vessel (*p*). Nevertheless, even in this case, the vessel will so far retain her neutral quality as to entitle her to appeal in that character to the International Prize Court (*q*).

i.) *Unneutral Service* (*r*). A neutral vessel will be deemed to be guilty of "unneutral service" in the sense and with the consequences above described (*s*) in the following cases: (1) If she is on a voyage specially undertaken with a view to either (*a*) the transport of individual passengers who are embodied in the armed forces of the enemy (*t*), although this will not cover the case of persons who are merely returning to the enemy country for the purpose of performing the military service required of them under the domestic law (*u*); or (*b*) the transmission of intelligence in the interest of the enemy (*x*). The meaning of "a voyage specially undertaken," appears to be that the service is not in the ordinary or usual course of the vessel's employment, as where she diverges from her course, or touches at a port not usually called at, in order to fulfil it. But in either case the service, in order to involve the vessel in guilt, must be rendered knowingly, although it need not be an exclusive service (*y*). (2) If she is to the knowledge of the owner, the charterer, or the master, engaged in transporting either (*a*) a military detachment of the enemy; or (*b*) one or more persons who in the course of the voyage directly assist the operations of the enemy (*z*). In this case knowledge of the nature of the service would be presumed if the persons carried were in uniform, but otherwise it would be for the captor to prove this (*a*). In such cases proof of guilt will involve not only the vessel herself, but also any goods on board belonging

(*x*) *Infra*, p. 486-7.
(*o*) See the Declaration of London, Art. 59; *supra*, p. 162.
(*p*) *Infra*, p. 485.
(*q*) See H. C., No. 12 of 1907, Arts. 3, 4; and *supra*, p. 196.
(*r*) Art. 45.
(*s*) *Supra*, p. 456.
(*t*) Art. 45.
(*u*) See Report, Pearce Higgins, 594.
(*x*) Art. 45.
(*y*) See Report, Pearce Higgins, 594.
(*z*) As by signalling: see Art. 45.
(*a*) See Report, Pearce Higgins, 595.

to the same owners, whilst the enemy persons may also be detained as prisoners of war (*b*). But here, as in other cases of partial service, the liability of the vessel will cease when the service has been discharged (*c*). Nor will such a liability be incurred if the vessel is encountered at sea whilst still unaware of the outbreak of hostilities, or if after learning this the master had no opportunity of disembarking his passengers. But ignorance of the war cannot be set up if the vessel left an enemy port subsequently to the outbreak of hostilities, or if she left a neutral port subsequently to their notification to the territorial Power, provided that this was made in sufficient time for the vessel to receive it (*d*).

(ii.) *Hostile Service.* A neutral vessel will be deemed to be guilty of "hostile service," in the sense and with the consequences above described (*e*), in the following cases: (1) If she takes any direct part in hostilities, in which case she will be subject to all incidental risks, and also to condemnation as enemy property if captured. (2) If she is under the orders or control of an agent placed on board by the enemy Government, this being deemed to mark her subserviency to enemy purposes. (3) If she is in the exclusive employment of the enemy Government, as where she is chartered for carrying coal to the enemy fleet. (4) If she is at the time of capture, exclusively devoted to (a) the transport of enemy troops; or (b) the transmission of intelligence in the interest of the enemy (*f*); in both of which cases she will continue liable as long as the relation lasts, even though not actually engaged in such service at the time of capture (*g*). Proof of guilt will here again entail not only the condemnation of the vessel, but also that of any cargo on board belonging to the same owners (*h*).

The Seizure on Neutral Vessels of Persons belonging to the Armed Forces of the Enemy.—According to the British view of the customary law, which appears in the *Trent* correspondence to have been equally admitted by the United States, a belligerent warship had no right to remove enemy persons found on board a neutral vessel on the high sea, but only a right, in cases of reasonable suspicion, to send the vessel in for adjudication. And this may now probably be regarded as an accepted rule, subject only to certain qualifications set up by Convention. Of these the first is that set up by the Hague Convention, No. 10 of 1907, which, as we have seen, authorizes the seizure by a belligerent of enemy sick or wounded found on board neutral hospital ships or merchant ships (*i*). The second is contained in the Declaration of London, 1909, which provides that any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made prisoner of war, even though

(*b*) See Report, *ibid.* 595.
(*c*) See Report, *ibid.* 594.
(*d*) Art. 45.
(*e*) *Supra*, p. 457.
Art. 46; *supra*, p. 460.
(*g*) See Report, Pearce Higgins, 596.
(*h*) Art. 46.
(*i*) Art. 12; although Great Britain has ratified the Convention under reserve of the Declaration already referred to, p. 123, *supra*.

there be no ground for the capture of the vessel (*k*). This right, it will be seen, is confined to persons actually "embodied in the armed forces of the enemy," and would not extend to persons in civil employment, or merely on their way to take up military service. Nevertheless it constitutes a serious encroachment on the British position (*l*); although not without some justification from the point of view of principle and convenience. From the former standpoint it may perhaps be justified on the ground that such persons are physically in the power of the belligerent and more noxious to him than contraband: and, from the latter, on the ground that it will save neutral vessels, and especially large passenger steamers, which may have on board individuals belonging to the armed forces of a belligerent, whose status was possibly unsuspected, from the costly inconvenience of being taken before a Prize Court and there detained perhaps for a long period, as might conceivably happen under the customary law (*m*). But it would manifestly be an international delinquency of a serious kind for a belligerent to exercise the right except on clear proof of the military character of the person seized (*n*). In January, 1912, during the Turco-Italian war, the *Manouba*, a French mail steamer, was seized by an Italian cruiser, whilst on a voyage from Marseilles to Tunis, and sent into Cagliari. She had on board at the time a number of Turkish passengers, who claimed to be in the service of the Red Crescent but were alleged by the captors to be combatant officers then on their way to the theatre of war. In the result, and on the protest of the French Government, the vessel was released and the passengers in question handed over to the French consul, on the understanding that inquiry should be made into their true character and that if found to be combatants they should be prevented from crossing the Tunisian frontier into Tripoli, whilst the question of compensation for the seizure of the vessel was reserved.

Questions arising in connection with the Use of Wireless Telegraphy. This invention, like that of aerial navigation (*o*), has given rise to a variety of new questions in international law, some of which still remain unsolved (*oo*). These include: (1) The question of the right of a belligerent to erect and use an installation of this kind on neutral territory (*p*). This, if at any time open to doubt, is now set at rest by the Hague Convention, No. 5 of 1907, which expressly forbids its exercise by a belligerent, or its allowance by neutrals (*q*). (2) The question of whether the use of wireless telegraphy in circumstances similar to those of the *Haimun* (*r*) can be accounted as espionage. As to this

(*k*) Art. 17; *supra*, p. 419.

(*l*) As taken up in the *Twee Gebroeders* controversy, *supra*, p. 456; and at the Peace Conference (*ibid.* p. 123).

(*m*) See Parl. Papers, Misc. No. 4 (1909), p. 98.

(*n*) *Ibid.* 98.

(*o*) As to which, see vol. i. 106, n. (*k*).

(*oo*) As to the rules formulated on this subject in 1904 by the Institute of International Law, see *Annuaire*, xxi. 327.

(*p*) As indeed occurred during the Russo-Japanese war, *supra*, p. 299, n. (*o*).

(*q*) See Arts. 3, 4 (*supra*, p. 451).

it has already been pointed out that the claim to treat the sending of messages by war correspondents to neutral countries for public information as espionage is altogether unwarrantable (*s*). (3) The question of the liability incurred by the interception at sea of wireless messages sent by one belligerent and their communication to the other (*t*), or by the transmission of false messages. Such acts if done by the enemy would, of course, be quite legitimate; and, if done openly, could not lawfully be treated as espionage (*u*). If done on a neutral private vessel they would amount to "unneutral" or "hostile" service, according to the nature of the employment, and would then involve the penalties attaching to those forms of service respectively (*v*). If done on a neutral warship, they would constitute a breach of neutral duty, for which reparation and the punishment of the offenders might be demanded. (4) The question of the use of wireless telegraphy by a neutral vessel for the purpose of communicating with a blockaded port in a matter affecting the operations of war. Such a proceeding would appear to constitute either a violation of the blockade, or an act of "unneutral" service, and would in any case be a lawful ground for condemnation (*x*). (5) Finally, there is the question of the right of belligerents to prevent neutral private vessels, on the high seas but within the sphere of belligerent operations, from using such apparatus for the conveying of general news. As to this, no such right is so far established (*y*), but the imposing of restrictions similar to those attaching to war correspondence on land would appear to be warrantable both by reason of the necessities of the case and in the light of existing analogies (*z*). In effect, this would mean a right to exclude such vessels from an area to be defined, although capable of variation by notice, except on condition of being licensed and of operating under the direction and control of the belligerent granting the license.

THE CARRYING ON BY NEUTRALS OF A TRADE CLOSED TO THEM IN PEACE.

THE "IMMANUEL."

[1799; 2 C. Rob. 186; Tudor, Leading Cases in Maritime Law, 948.]

Case. In 1799, during war between Great Britain and France, the "Immanuel," a Hamburg ship, was captured by the British

(*s*) See H. R. 29; and p. 452, *supra*.

(*t*) For despite the use of cipher much damaging information may be gained.

(*u*) *Supra*, p. 99.

(*v*) *Supra*, p. 457 *n*.

(*x*) *Ibid.*

(*y*) Although in fact exercised by Japan in the case of the *Haimun*: *supra*, p. 152.

(*z*) *Supra*, pp. 97, 106, 265, 269; and Phillipson, Studies in International Law, 105 *et seq.*

whilst on a voyage from Hamburg to St. Domingo. She had, however, touched in her voyage at Bordeaux, where she sold part of the goods brought from Hamburg and took on board a quantity of other goods for St. Domingo. Condemnation of both ship and cargo was sought by the captors on the ground that the vessel was in fact carrying on a trade between France and one of her colonies. Various questions were raised in the course of the case, but the main issue was whether the engaging by neutrals in a direct trade between the enemy country and its colonies was to be regarded as illegal and as a ground for confiscation. In the result the cargo taken in at Bordeaux was condemned; but the vessel, in view of the considerations referred to in the judgment, was restored, although subject to loss of freight and expenses.

Judgment. Sir W. Scott, in his judgment, stated, in effect, that on the breaking out of war neutrals had a right to carry on their accustomed trade, except trade to blockaded places or in contraband articles, and subject to visit and search. But it was a very different thing for the neutral to engage in a trade not previously open to him, to which he had no title in time of peace, and which in fact he could obtain in war by no other title than the success of one belligerent against the other and at the former's expense. The colonial trade was of such a character, it being in general confined to the mother country to which the colony belonged; thus affording to the mother country at once a market for her own commodities and a supply of those furnished by the colony. The other belligerent, moreover, had a right to possess himself of such colonies if he could, and a superiority at sea and the cutting off of outside supplies helped him greatly to this end. Under such circumstances what right had a neutral, who had no existing interest in such trade, to step in and prevent the execution of the belligerent's purpose by sending supplies to and exporting products from such a colony? Neutrals had, in fact, no right to intrude into a commerce which had been uniformly closed against them, and which was now forced open only by the pressure of the war. Moreover, even if such trade was legally opened up to neutrals during the war, the force of long-estab-

lished connection would still have the effect of preserving it for a long time to the mother country. It was upon these and other grounds that an instruction had been issued for the purpose of preventing the communication of neutrals with the colonies of the enemy; and this was, no doubt, intended to be carried into effect on the same footing as the prohibition enforced in the war of 1756. The importation by a neutral of the manufactures of the enemy into his own country and their subsequent export to an enemy colony, or the converse of this as regards colonial products, rested after all on a different footing; for in either of such cases the goods became a part of the stock of the neutral country, and only reached the enemy subject to proportionable disadvantage. It was true that variations of commercial policy often occurred in time of peace, but such measures differed from the present as not being undertaken in relief of pressure resulting from the war. Hence in the present case, the goods shipped at Bordeaux, even though neutral property, must be treated as subject to confiscation, as being engaged in a direct trade between the enemy country and its colony. Nor was there any distinction between an outward and a return voyage. But as regards the ship, this, even though it belonged to the same owners as the cargo, would, in view of the fact that the case was one where a neutral might more easily misapprehend the extent of his rights, and had to act, moreover, without notice of former decisions on the subject, be restored subject to a forfeiture of freight and expenses [a].

The British practice with respect to the liability incurred by neutrals who engage in time of war in a trade closed to them in time of peace, has varied somewhat both as regards the attitude taken up by the Government [b] and the decisions of the Courts. Broadly, there are three forms of restriction that need to be noticed: (1) The first is that which is commonly known as "the rule of the war of 1756" [c]. During that war, France, finding herself unable by reason of British maritime superiority to maintain her trade with her

[a] The illegality of such voyages was subsequently held by the Lords of Appeal to attach as strongly to the [illegible] 3 C. Rob. 232, n. [illegible] 3 C. Rob. 232, n. An enumeration of the leading cases on this [illegible] from Pritchard's Admiralty Digest will be found in Phill. i. 385, and an analysis of them in Wheat. ii. 304, n.

[b] In the instructions issued to the naval forces.

[c] Although rarely called

colonies, which had hitherto been exclusively confined to French subjects and vessels, allowed the Dutch, who were then neutral, to carry on that trade under special licence, other neutrals being excluded. In these circumstances the British Government maintained and the Courts affirmed this view that such a trade was illegal; with the result that Dutch vessels so employed were seized and condemned, together with their cargoes, on the ground that they had virtually become incorporated in the mercantile marine of the enemy (*b*). The principle on which the Courts here proceeded was that where neutrals in time of war by special indulgence engage in a purely national commerce from which they were previously excluded they necessarily become impressed with a hostile character. This rule appears to be perfectly legitimate in principle, and might rightly be enforced under similar conditions if these should recur (*c*). The rule was not, however, enforced in the war with France which broke out in 1778: apparently on the ground that France had previously opened up her trade with the West Indian colonies to all neutrals: although this appears to have been done only in anticipation of the war, and although the monopoly was in fact re-established after the war had come to an end (*d*).

(2) In 1793 this restriction was carried somewhat further. During that war France again opened up her colonial trade, but on this occasion to all neutrals without distinction and without special licence. Great Britain, nevertheless, maintained that where any trade which was previously a national monopoly was thrown open by a belligerent under pressure of the war, neutrals by engaging in it virtually intervened in the war in aid of one belligerent and to the prejudice of the other, with the result of rendering their vessels and property embarked in such trade liable to capture and confiscation. This rule, which is sometimes designated "the rule of 1793," was enforced throughout the Revolutionary wars. It was, in its extended form, applied to a participation by neutrals both in a previously exclusive colonial trade, for the reasons given in the judgment already referred to (*e*); and in a previously exclusive coasting trade, on the ground of "the objective accommodation" which the carrying on of such a trade, during his own disability, afforded to the enemy (*f*). Even as thus extended, the rule, although the subject of much controversy, appears to be legitimate in principle, for the reason that neutrals, by engaging in what was previously purely national trade thrown open only by reason of belligerent pressure,

(*b*) See Wheaton, Hist., p. 663; Phillimore, iii. 301; Lindo v. Rodney, 2 W. Bl. 813; Maxwell v. Hill, 1 H. Bl. 148; Rose v. Hart, 8 T. R. 499 (proposal to extend the restriction of 1756 was overruled by the Lords of Appeal); Bynkershoek, Quæst. Jur. Pub., bk. i. ch. 10.

(*c*) See p. 465, *post*.

(*d*) The circumstances of this relaxation are referred to in the judgment in the case of *The Vrouw Judith*, 1 C. Rob. 296).

(*e*) *The Polly*, 2 C. Rob. 136, p. 161; *The Emanuel*, 3 C. Rob. 296; *The Immanuel*, 4 C. Rob. 122; *The Anna Catharina*, 6 C. Rob. 72, (although these false papers were used

and by carrying on in fact for one belligerent a trade which he can no longer carry on for himself, relieve him against the consequences of war and thus identify themselves with him in interest (*j*). Within these limits, and so long as confined to a direct colonial trade or a genuine coasting trade (*k*), the rule has the approval of a considerable body of juristic opinion (*l*). At the same time, even within these limits its international validity is not unquestioned; whilst even under the British practice it is not invariably enforced (*m*). So far as relates to the colonial trade, indeed, the question has lost much of its importance, by reason of the fact that the colonial trade has now been largely, although not universally (*n*), opened up to foreigners by States having colonial possessions. But so far as relates to the coasting trade this, although now opened up by Great Britain (*o*), is still maintained as an exclusive trade by other States (*p*); and here the question of the international validity of the rule may still present itself for decision. Its extension by the "doctrine of continuous voyages" will be dealt with hereafter (*q*).

(3) Finally it needs to be remarked that, for a short time (*r*), similar restrictions were applied by Great Britain to the carrying on by neutrals of a trade between their own country and an enemy colony, and also of a trade between different ports of the enemy country even though with a cargo brought from a neutral country (*s*). But such restrictions are now admitted to have been irregular, and are not likely to be revived (*t*).

General Notes. *The Right of Neutrals to engage in a Trade closed to them in Peace.*—The question of the general validity of

(*j*) But see Westlake, ii. 254.

(*k*) That is, a carrying of belligerent goods between belligerent ports, as distinct from a carrying of neutral goods to two or more belligerent ports in succession.

(*l*) Both British and American, and to a smaller extent Continental, see Hall, 634, n. Wheaton (Dana), 666, appears to oppose any extension beyond the original limits. The opinion of Story, J., in its favour is cited in Halleck, ii. 308. On the question of practice, see *ante*, p. 455.

(*m*) The British Manual of Naval Prize Law, 1888, expressly directed that the rule prohibiting neutral vessels from engaging in a trade closed to them in time of peace should not be enforced except under special instructions: see Art. 141, which also states that its operation would be interfered with by Art. 2 of the Declaration of Paris, as to which see *infra*, p. 465.

(*n*) So, trade between the United States and her over-sea dependencies is confined to national vessels; whilst a similar reservation is made by France as regards trade between French and Algerian ports; and by Russia as regards trade between her Baltic ports and Vladivostock.

(*o*) 17 & 18 Vict. c. 5; and now 39 & 40 Vict. c. 36, ss. 140, 141.

(*p*) As by the United States.

(*q*) *The William*, 5 C. Rob. 385; *infra*, p. 466.

(*r*) By instructions issued soon after the commencement of the war of 1793, but afterwards relaxed by the instructions of 1794 and 1798: see Halleck, ii. 303 *et seq.*

(*s*) As distinct from a carrying of enemy goods between enemy ports.

(*t*) See Phill. iii. 383 *et seq.*

the rule which precludes neutrals from engaging in a trade closed to them in peace but opened to them on or after the outbreak of war, may still arise with respect to the coasting trade, which is even now often reserved to nationals, and the colonial trade, which is occasionally so reserved (*u*). Nor does its validity appear to be affected by Art. 2 of the Declaration of Paris (*x*): for, if the rule is otherwise well-founded, it can scarcely be claimed that the protection of the neutral flag extends either to vessels which have really forfeited their claim to the neutral character by identifying themselves with the enemy (*y*), or to goods found thereon which are engaged in an unlawful traffic (*z*). On the occasion of the Naval Conference, 1908-9, it was proposed that neutral vessels engaging with the sanction of the enemy Government in a trade opened to them after or within two months before the outbreak of war, should be liable to be treated as enemy vessels; but it was not found possible to reach any agreement on the subject, and in the result the question of liability in such cases was expressly declared to be outside the scope of the provisions of the Declaration dealing with enemy character (*a*). The question therefore remains an open one. On the one hand, the validity of the rule may be supported on the grounds that for neutrals to engage in what was formerly a national and exclusive traffic, opened up only under the pressure of war, is either an intervention in aid of that belligerent, or at any rate an incorporation of the vessels so engaged in the mercantile marine of the belligerents; that if neutrals have acquiesced in their own exclusion from such trade by one belligerent in time of peace their exclusion by the other belligerent in time of war leaves them in no worse position; and that the rule itself, although questioned by some, has the support of a large body of juristic opinion (*b*) and the sanction of a prepotent practice (*c*). On the other hand, it is said that neutrals by engaging in such a trade do not do anything in prejudice of the other belligerent's military operations, which is the only true ground of restriction (*d*); that neutrals are not either privy to or responsible for the reasons which may actuate the belligerent in throwing open what was previously a national and exclusive trade; and that in engaging in what was previously a reserved trade, neutrals merely carry to and from ports which are already open to them for other purposes (*e*)

(*u*) *Supra*, p. 464.

(*x*) Although this is sometimes contended: see *supra*, p. 464; Woolsey 1888, 349; Westlake, ii. 255.

(*y*) Any more than it would extend to armed vessels engaging in hostile service: *supra*, p. 458.

(*z*) *See per* Story, J., *The Venus*, (2 Dall. 344).

(*a*) Art. 57; and p. 466, *supra*.

(*b*) Including that of Vattel, iii. c. 7, s. 111, who limits the neutral right to a continuance of their *ancient commerce* (*le*). See also p. 464, n. (*s*), *supra*.

(*c*) As a rule long enforced by Great Britain, and at present accepted by three leading maritime Powers, including Germany: see Parl. Papers, Misc. No. 5 (1909), p. 2; *The Wakaura Takeda-shi*, 633.

(*d*) But see pp. 284, 385, *supra*.

(*e*) Hall 631; Westlake, ii. 255.

Meanwhile, and until it is otherwise determined by Convention or by the International Prize Court, it will be open to States, such as Great Britain, to continue to enforce this rule within the limits and subject to the restrictions previously indicated (*f*); whilst it would, it is conceived, also be open to such States to ratify the Declaration of London under reservation of the right to adhere to their own rules on this subject unless and until altered by common agreement (*g*).

THE "DOCTRINE OF CONTINUOUS VOYAGES" (*a*).

(i) AS APPLIED TO PROHIBITED TRADE.

THE "WILLIAM."

[1806: 5 C. Rob. 385.]

Case. In 1800, during war between Great Britain and Spain, the "William," a neutral vessel under the American flag, shipped at La Guayra (*b*) a cargo of cocoa, the property of her owners, which was carried to Marblehead in the United States. There the cargo was landed, entered at the customs house, and a bond given for the payment of duties, whilst some slight repairs were also effected. Thereafter the vessel took on board the greater part of her former cargo, with some additions, and sailed for Bilbao, in Spain. In the course of the voyage she was captured by the British, and sent in for adjudication on the ground of being engaged in a direct trade between Spain and her colonies, in violation of the rule of war of 1756 (*c*). In the Court below the ship and some part of the cargo were restored, but the cargo which had been brought from La Guayra was (*d*) condemned. On appeal this decree was confirmed by the Lords Commissioners of Appeal in Prize Cases.

Judgment. Sir W. Grant, in delivering the judgment of the Court of Appeal, observed that the question for decision was

(*f*) *Supra*, p. 463-4.

(*g*) For although the Declaration cannot be signed under reservation of particular provisions, Art. 57 merely declares the rule to be outside its scope.

(*a*) This is the term commonly used in the text books, although the British Memorandum speaks, perhaps more appropriately, of "the doctrine of the continuous voyage."

(*b*) Then a Spanish colonial port.

(*c*) *Supra*, p. 462.

(*d*) After further proof on the question of genuine importation.

whether the cargo shipped at La Guayra was to be considered as proceeding directly from that port to Spain, within the meaning of the Instructions, which prohibited a direct trade between a hostile colony and its mother country (*e*). The mere touching at a neutral port and the unloading of the cargo there, even though accompanied by the payment of duties, did not necessarily amount to the termination of one voyage and the commencement of another; for such a proceeding might be wholly unconnected with any purpose of importation into the place where it occurred. It might, indeed, be done for the very purpose of making it appear that the voyage had begun at some other place than that of the original loading. In such a case the real voyage would still be from the place of the original shipment, notwithstanding the attempt to give it an appearance of having begun from a different place. The real test was whether there was a genuine importation into the neutral country. In the present case it appeared that, although a sum of $1,239 had been paid or secured as duties of customs, a refund of $1,211 had been obtained on reshipment; and also that the owners had neither tried nor meant to sell the cargo in question in the American market. Nor would the continuity of the voyage have been broken even if there had been, as was alleged, an original intention to sell at Marblehead, if this purpose had in fact been subsequently abandoned; for an intention to import was far from being equivalent to an importation. An examination of the cases (*f*) served to show that the payment of duties had never been adopted as an absolute test of genuine importation; and that the payment of a slight duty, as in the present case, would not tend to establish the *bona fides* of an importation in the same degree as the payment of a heavy duty. For these reasons the sentence of condemnation must be affirmed.

The "doctrine of continuous voyages" consists in treating an adventure which involves the carriage of goods in the first instance to a neutral port and thence to some ulterior and hostile destination, as being, for certain purposes, only one transportation.

(*e*) See, p. 463.

(*f*) Cases touching on the payment of duty as a test of *bona fide* importation: including *The Lisse*, *The Polly*, *The Maria*, *The Emanuel*, and *The Freeport*.

with all the consequences that would attach if the neutral port had not been interposed (*g*). This doctrine was first applied by the British Courts to cases of prohibited trade, and especially to trade prohibited under the rule of the war of 1756. The effect of the British instructions (*h*) being to prohibit any trade direct between the enemy colonies and mother country, neutrals sought to evade this restriction by touching at a neutral port and there landing cargo and paying or purporting to pay dues, subsequently reshipping the original cargo, often with some additions, and thereafter proceeding to some destination in the enemy country. In such circumstances, however, the British Courts held that the voyage must be treated as a continuous one, only colourably interrupted, and that the penalty would take effect. But this was not held to apply where it could be shown that there had been a genuine importation of the goods into the neutral country, even though a part of the same goods might have been carried by the ship on her subsequent voyage (*i*). In such cases, therefore, the crucial question was whether there had been a genuine submission of the goods to the neutral market. It is material to notice, however, that according to the earlier decisions the doctrine was only held to apply where the second stage of the journey had been entered on, and where the carriage was continued by the same ship (*j*); conditions not observed in the later applications of this doctrine.

The same doctrine was also applied to cases of trading with the enemy. So, in the case of the *Jonge Pieter* (4 C. Rob. 79), it was held, under the rule prohibiting trade with the enemy, that British goods consigned immediately to a neutral port but intended to be forwarded thence to an enemy port were liable to condemnation, such trading being equally illegal even though circuitous. This, it will be seen, involves an extension of the original rule, in so far as it was applied to a case where fresh means of transportation were employed, thus giving rise to the "doctrine of continuous transport," as distinct from that of the "continuous voyage" (*k*). In the case of the *Mashona* (10 Cape Times L. R. 163), a British vessel was arrested, during the South African war, whilst on a voyage from New York to various South African ports, including the neutral port of Delagoa Bay, and condemnation both of the vessel and certain parts of the cargo was sought on the ground of trading with the enemy; it being alleged, as was indeed the fact, that such cargo was intended to be sent on from Delagoa Bay to persons or firms domiciled in the territory of the enemy. In the

(*g*) See the British Manual, p. 17, s.

(*h*) Those referred to in the principal case were issued in 1793; see p. 463, *ante*.

(*i*) *The Indian Chief*, 3 C. Rob. 12; *The Maria*, 5 C. Rob. 365.

(*j*) See, however, *The Bernon*, 1 Gallison's (U.S.) Rep. 178, where it was held that a transportation of goods from one enemy port to another, in contravention of an Order in Council of 1807, was not broken by a sale and transhipment, which was in fact collusive at a neutral port.

(*k*) See also *The Methuen* (1 Hagg. 92), and *The Ulysses* (1 Hagg. 257).

result the vessel was released on the ground that the conduct of those responsible for her had been such as to exempt her from liability (*m*); but as to the goods, it was held that the sending of British goods to a neutral port with intent that they should afterwards be sent on, even by land transport, to the enemy country, clearly fell within the rule against trading with the enemy, and hence that all cargo consigned to persons domiciled there must be condemned (*n*).

(ii.) AS APPLIED TO BREACH OF BLOCKADE.

THE "SPRINGBOK."

[1863: 5 Wall. 1; 1871; Moore, Int. Arb. iv. 3928.]

Case. During the American civil war, the "Springbok," a British vessel, was on a voyage from London to Nassau, with a cargo of goods consisting partly of contraband. Before arriving at Nassau she was captured by a United States cruiser and sent in for adjudication, on the ground of having intended a violation of the blockade of the coasts of the Confederacy. In the District Court both vessel and cargo were condemned; but on appeal to the Supreme Court the decree of condemnation was reversed as to the vessel, although confirmed as to the cargo.

Judgment. The judgment of the Supreme Court was delivered by the Chief Justice. With respect to the ship, it was observed that the Court had already laid down in the case of the *Bermuda* (3 Wall. 514), that where goods ultimately destined for a belligerent port were being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection of the owners

(*m*) That is, in making full disclosure to the authorities; the implication from the majority judgment being that the ship would otherwise have been liable; whilst, in the opinion of Lawrence, J., she was liable in any case; see p. 77, *ante*.

(*n*) See also J. S. C. L. (N. S.) ii. 326. In fact, however, it would appear that such goods were already liable as enemy property, irrespective of the question of destination, for the reason that property found on the sea and not covered by the neutral flag, is liable, whether proceeding to or from the enemy country, so long as it is shown to be vested in the enemy; a fact which is touched on in the judgment of De Villiers, C. J.

with the ulterior destination of the goods, the ship, although liable to seizure with a view to the confiscation of the goods, was not herself liable to condemnation. In the opinion of the Court the case of the "Springbok" fairly came within this rule: her papers being regular and genuine, and the owners neutral and having no interest in the cargo or proved knowledge of the destination of the goods. With respect to the cargo, however, it appeared that no consignees were named and that it was made deliverable to order. Moreover, the nature of the contents of more than two-thirds of the packages on board had been concealed. A small part of the cargo consisted of arms and munitions of war: another part of articles useful alike in peace or war: whilst the rest, although innocent, belonged to the same owners. But whether contraband or not it was liable if destined for a blockaded port. It was evident from the ship's papers and other documentary evidence that the cargo was not intended for Nassau, but was intended to be transhipped there: whilst, in view of the evidence, the Court entertained no doubt that the cargo was intended to be carried on in violation of the blockade of the ports of the rebel States, and that it had been shipped with that intention. The voyage was therefore, both in law and according to the intent of the parties, but one voyage—from London to the blockaded ports—and the cargo was liable to be captured during any part of that voyage. For these reasons the condemnation would be reversed with respect to the ship, although without costs or damages: but affirmed with respect to the cargo.

Award of Commission. This decision, although not the subject of any official protest (*a*), gave rise to much dissatisfaction: provoking, indeed, a remarkable expression of criticism and protest on the part both of foreign and British jurists (*b*). At a later time, also, it formed the subject of a claim before the British and American Claims Commission (*c*). But in the result a claim for

(*a*) Indeed, it was afterwards stated in answer to a petition of the cargo-owners that H. M. Government would not be justified in making any claim for compensation.

(*b*) See the opinion of the Maritime Prize Commission, nominated by the Institute of International Law, cited in Moore, Digest, vii. 731; and the opinion of Bluntschli, *ibid.* 733.

(*c*) Appointed under the Treaty of 1871, *supra*, p. 324-5.

the value of the cargo, with costs and damages, was unanimously rejected: although a claim for losses arising out of the detention of the ship, with costs and expenses, was allowed, and an award of $5,065 made in respect thereof (*d*).

Of all the cases decided by the United States Courts in relation to the "doctrine of continuous voyages" (*e*) that of the *Springbok* has probably been most widely discussed and criticized (*f*). And although the decision itself cannot, having regard to the circumstances under which it was given (*g*) and its lack of preciseness (*h*), be said to have any claim to authority, and although the "doctrine of continuous voyages" is scarcely likely to be applied in the future to cases of blockade, yet it serves to illustrate the extreme point to which that doctrine was once carried and its relative position under the existing law.

During the American civil war a considerable traffic, both in blockade-running and contraband, was carried on by British vessels. These vessels sailed in the first instance for Nassau, or some other neutral port in the vicinity of the coasts of the Southern Confederacy (*i*), and there either made a new start for a Confederate port, or else transhipped their cargoes with a view to their being carried on by other vessels; seeking in this way to secure immunity, at any rate during the voyage from the port of shipment to the neutral port. It was in these circumstances that the United States Courts applied the doctrine in question to cases of blockade and contraband; holding that if goods of any kind were intended to be carried on to a blockaded port, whether by the same or by any other vessel, or if goods of a contraband character were intended to be sent on to the rebel territory, whether by the same or by any other instrument of transport, they were subject to seizure and condemnation; and that condemnation would, moreover, extend also to the vessel in cases where privity could be shown or reasonably presumed on the part of the owners (*k*). Some applications of this doctrine, although novel at the time, appear, from our present standpoint, to have been legitimate, but others were quite indefensible; whilst throughout both law and facts appear to have been strained against British owners (*l*).

(*d*) Apparently in respect of the detention of the vessel from the time of the decree of the District Court to her final discharge.

(*e*) *Supra*, p. 468.

(*f*) For a summary of criticisms, see Moore, Digest, vii. § 1256.

(*g*) It was the decision of a bare majority and against the opinion of the members of the Court who were most skilled in this branch of the law.

(*h*) It does not, for instance, even designate the port where blockade was to be violated.

(*i*) Such as Cardenas or Matamoras.

(*k*) The principal cases are *The Bermuda*, 3 Wall. 515; *The Springbok*, 3 Wall. 559; *The Stephen Hart*, 5 Wall. 1; and *The Peterhoff*, 5 Wall. 28.

(*l*) As was, indeed, later admitted, see the remarks of Nelson, J., in 1873, quoted by Hall, 669 *et seq.*

In these decisions questions of blockade-running and contraband carriage are largely intermingled. The decision in the *Springbok* was, as we have seen, generally reprobated, and—apart altogether from the provisions now embodied in the Declaration of London (*m*)—would not be followed by the British Courts (*n*) or, seemingly, even by those of the United States (*o*). Hence we may take it that in cases of blockade, even under the customary law, no ship on a genuine destination to a neutral or open port would now be condemned under the "doctrine of continuous voyages"; and, further, that no cargo on board her would now be held liable under the "doctrine of continuous transport," for the reason that blockade is essentially a question of the ship, and not of the cargo except as connected with the ship (*p*). Nevertheless, it would still be open to a captor to show that the ostensible destination of a vessel to a neutral or open port was not genuine, and that her actual destination was to a blockaded port (*q*).

(iii.) AS APPLIED TO CONTRABAND.

THE "PETERHOFF."

(1866; *Supra*, p. 420; Moore, Digest of International Law, vol. vii. § 1260.)

During the American civil war, the "doctrine of continuous voyages"—or, as it is sometimes termed in this connection, the "doctrine of continuous transport" (*r*)—was applied also to the carriage of contraband. In the case of the *Stephen Hart* (3 Wall. 559), a British vessel carrying contraband, but bound for the neutral port of Cardenas, was condemned, together with her cargo, on the ground that the contraband was intended to be carried on to enemy territory either by the same, or by some other vessel. In the case of the *Bermuda* (3 Wall. 514), a British vessel bound for Nassau with contraband was similarly treated (*b*). But the most authentic exposition of the doctrine is probably that contained in the case of the *Peterhoff*. This, as we have seen, proceeded solely

(*m*) See Art. 9; p. 477, *infra*.

(*n*) There is some authority in English law to the effect that where a vessel immediately destined for an open port is shown to be ultimately destined for a blockaded port, she will be treated as having an illegal destination throughout the voyage, unless this is shown to have been abandoned; but there is no direct decision to this effect, and the alleged rule has now been officially repudiated: see the British Memorandum, p. 8.

(*o*) See Moore, Digest, vii. 729.

(*p*) See *The Jonge Pieter*, 4 C. Rob. 79; *The Ocean*, 3 C. Rob. 297; *The Stert*, 4 C. Rob. 65).

(*q*) See Manual of Naval Prize Law, Art. 124.

(*r*) See Oppenheim, ii. 500.

(*b*) In both these cases, however, the Court proceeded also on the ground of the goods being enemy property and on the ground of a presumed intention to break blockade.

on the question of contraband (*c*). In effect, the judgment decided that goods in the nature of contraband, whether "absolute" or "conditional," even though immediately bound for a neutral port, were subject to capture and condemnation if it could be shown, in the former case, that they were intended to be carried on, even though by a different method of transport or overland, to the enemy territory; or, in the latter, that they were to be so transported on an ultimate destination for naval or military use (*d*).

In the British Courts there is no reported case in which the "doctrine of continuous voyages" is applied in specific terms to the carriage of contraband. In *Hobbs* v. *Henning* (34 L. J. C. P. 117) an action on a policy of insurance on a part of the cargo of the *Peterhoff*, in which the issue was whether such cargo was to be regarded as contraband carried without the knowledge of the insurer and in derogation of the policy it was held in effect that goods consigned to a neutral port, even though of a character likely to be of use in war, and even though the owner might have expected that they would be sent on to belligerent territory (*e*), could not, on an allegation of mental process only, be regarded as contraband. But in the subsequent case of *Seymour* v. *The London and Provincial Marine Insurance Association* (41 L. J. C. P. 193; 42 L. J. C. P. 111, n.) -which was also an action on a policy of insurance on a part of the cargo of the *Peterhoff*, although in this case the policy was subject to an express warranty against contraband it was held that in the circumstances of the case the goods must be regarded as contraband, and the policy as invalidated by their shipment. With respect to official practice, the doctrine of continuous voyages in its application to contraband was not recognized by the Admiralty Manual of Naval Prize Law (*f*). But as against this, the fact that no protest was made by the British Government against the American decisions, and the attitude subsequently taken up by it in the *Bundesrath* controversy, serve to show that this doctrine has now been officially accepted (*g*).

CONTROVERSY BETWEEN GREAT BRITAIN AND GERMANY WITH RESPECT TO THE "BUNDESRATH" AND OTHER VESSELS.

1899; Parl. Papers—1900, Africa, No. 1; Moore, Digest of International Law, vii. § 1262.

Case. In December, 1899, during the South African war, the "Bundesrath," a German mail steamer, whilst on a voyage to

(*c*) *Supra*, p. 120.
(*d*) *Supra*, p. 122.
(*e*) So long as he was not a party to any actual arrangements for that purpose; the question of liability in this case being left open.
(*f*) See Art. 72; and p. 475, *infra*.
(*g*) *Ibid.*

Lorenzo Marques, in Delagoa Bay, was arrested by a British cruiser, and brought into Durban on suspicion of carrying contraband ultimately destined for the enemy territory. She also had on board a number of Dutch, German, and Austrian passengers who were believed to be officers and intending combatants. On application to the Prize Court her mails were released and sent on by another vessel. After search no contraband was found, and both vessel and cargo were discharged after a detention of some twenty-one days. In January, 1900, the "Herzog," another German steamer, bound for the same port, was arrested and brought into Durban on a similar charge. She, too, had amongst her passengers a number of Dutch and German medical and other officers and nurses. The British Government, however, ordered her to be released unless it was found that she had on board guns or ammunition or provisions "destined for the enemy Government and intended for or specially adapted for the use of troops." In the result the vessel was released after three days' detention. About the same time the "General," another German steamer, was detained at Aden on a similar charge; but, after an exhaustive search, involving the removal of a large part of her cargo, this vessel also was released, after six days' detention.

Controversy. The German Government had meanwhile entered its protest against these seizures: basing this in part on the assurance that no contraband was carried (*a*), and in part on freedom of trade between neutrals (*b*). Upon the release of the vessels the British Government, after expressing its regret for what had occurred, admitted in principle its obligation to make compensation, and offered to submit the question to arbitration should an agreement by other means be found impracticable. It also issued instructions to prevent the stopping and searching of vessels at Aden or at any point equally or more distant from the seat of war. Finally, it agreed provisionally, and until other arrangements should be made, that German mail steamers should not be searched "on suspicion only."

(*a*) As in the case of *The Bundesrath*. (*b*) As in the case of *The General*.

In the discussion that ensued with reference to the legality of these proceedings, the German Government contended, in effect, that the arrest of the vessels was altogether unjustifiable for the reason that, no matter what might have been on board, "there could be no question of contraband of war," since, according to recognized principles of international law, there cannot be contraband of war in trade between neutral ports. It was added that this had been recognized by the British Government itself in its protest against the decision in the case of the "Springbok," and was also recognized in the Admiralty Manual of Naval Prize Law (*c*). In reply, the British Government pointed out that the "Springbok" decision had not been the subject of any official protest on its part (*d*); that the directions contained in the Manual, although sufficient for wars waged in the past, were quite inapplicable to the war then proceeding with an inland State whose only communication with the sea was over a few miles of railway to a neutral port; that the regulation referred to—viz., "that the destination of the vessel is conclusive as to the destination of the goods on board"—could not apply to contraband of war, if such contraband was at the time of seizure intended to be delivered to an agent of the enemy at a neutral port, or was in fact destined for the enemy's country; and finally, that the true view was believed to be as stated by Professor Bluntschli, that "if ship or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified" (*e*). In the result, an arrangement was come to, and compensation paid for the detention of the vessels (*f*).

This case serves at once to mark the official acceptance of the "doctrine of continuous voyages" in relation to contraband by Great Britain, and to illustrate the conflict of opinion and practice that prevailed on this subject under the customary law. Incidentally also it illustrates several other points, such as the non-exemption of mail steamers from visit and search (*q.v.*), the voluntary limitation by a belligerent of the area of visit and search, and the liability

(*c*) See Art. 72.

(*d*) See *ante*, p. 179, and n. (*e*).

(*e*) *Droit International Codifié*, ed. 1874, 813.

(*f*) See also L. Q. R. xvii. 12; xvii. 193.

(*g*) Except as a matter of grace or arrangement.

of a belligerent to make compensation for arrests made without reasonable cause (*h*). On the main issue, the British contention as regards the application of the doctrine in question to absolute contraband generally, and to conditional contraband in the special circumstances of the war, appears to be borne out by the agreement which was subsequently arrived at on this subject by the Naval Conference of 1908-9 (*i*).

The "doctrine of continuous voyages," although commonly reprobated by European publicists, is nevertheless approved, in its application to contraband, by some Continental writers of authority (*k*); whilst it has on some occasions also been applied in practice. So, in 1854, during war between France and Russia, the *Frau Anna Hourina*, a Hanoverian ship, which had been captured by a French cruiser whilst on a voyage from Lisbon to Hamburg with a cargo of saltpetre, was condemned by the French Courts, on the ground that the cargo was contraband and was really intended to be transported to Russian territory (*l*). The doctrine was, again, judicially adopted by the Italian Prize Courts in the case of the *Doelwyck*, a Dutch vessel captured by an Italian cruiser in 1896, during war between Italy and Abyssinia, and sent in for adjudication on the ground of carrying contraband. It appeared that the vessel had on board at the time a cargo of arms and ammunition, which although immediately proceeding to Djiboutil, a neutral port, was really intended to be carried thence into Abyssinia for the use of the armed forces of the enemy. In these circumstances the Italian Court pronounced both vessel and cargo to be liable to condemnation; although it refrained from passing that sentence on the ground that peace had meanwhile been restored (*m*). During the Russo-Japanese war no decision appears to have been given under this doctrine (*n*). Such appears to have been the position occupied by this doctrine under the customary law prior to the Declaration of London.

General Notes. *The "Doctrine of Continuous Voyages": its Application to Cases of Prohibited Trade.*—Although the "doctrine of continuous voyages" has now been affirmed in certain cases by

(*h*) Although in two of the cases, at any rate, there seems to have been reasonable ground for suspicion. As to the growing power of neutral States in restraint of belligerent interference with their trade: see Barclay, Problems, 107.

See p. 477, *infra*.

(*k*) See Oppenheim, ii. 504 *et seq.*

(*l*) Calvo, 4th ed. p. 2767. Amongst the facts relied on was the proof of an excessive trade in contraband between Hamburg and Riga.

(*m*) This being, however, only as of grace, and not as of right: see Oppenheim, ii. 556. In *Rous* v. *The Royal Exchange Assurance Corporation* (1897, 2 Q. B. 135) it was held, in an action on a policy of insurance on this vessel, which covered war risks, that the release of the vessel after action brought did not disentitle the assured to recover as for a total loss, on a prior notice of abandonment.

(*n*) Although raised, somewhat in-

the Declaration of London, its application in other cases is still left to the operation of the earlier law. There were, as we have seen, three classes of cases in which it was previously applied (1) cases of prohibited trade; (2) cases of blockade; and (3) cases of contraband. With respect to cases of prohibited trade, the validity of the rule, which excludes neutrals from participating in war in a trade closed to them in time of peace, still remains open to question (*o*); but if, as has been suggested, that rule is to be regarded as valid and subsisting, then it would seem that the "doctrine of continuous voyages" must also be deemed to apply, although subject probably to the limitations which attached to it under the original British practice (*p*). It would appear also to be equally applicable to violations of the rule against trading with the enemy, which, although a rule of municipal law, may under the British and American practice affect foreigners who are domiciled within belligerent territory.

(ii.) *Cases of Blockade.*—With respect to breach of blockade, the Declaration of London now provides that whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured if at the moment she is on her way to a non-blockaded port (*q*). As between the signatories, therefore, and when a breach of blockade is in question, it is the immediate destination of the vessel alone, and not any ulterior destination of the cargo, that must be looked to. And although it would still be open to a captor (*r*) to prove that the alleged destination of a vessel to a neutral or open port was merely simulated (*s*), yet under the Declaration of London such a seizure could only be effected within the "area of operations" or on a pursuit commenced therefrom (*t*).

(iii.) *Cases of Contraband.*—With respect to contraband, the Declaration provides that "absolute contraband" shall be liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to his armed forces; it being immaterial in this case whether the carriage of the goods is direct, or entails transhipment or even a subsequent transport by land (*u*). In the case of "absolute contraband," therefore, the "doctrine of continuous voyages" will still apply, if it can be shown that the goods are to be carried on in the same vessel; and the "doctrine of continuous transport," if it can be shown that they are to be carried on by other means of transport, either to the enemy territory or to his armed forces (*v*). And although the ship's papers are in general to be

appropriately, in the case of *The Stigstad*, Takahashi, 742; this being really a case of an abandoned intention to break blockade.

(*o*) See p. 165.

(*p*) See p. 468.

(*q*) Art. 19; p. 419, *supra*.

(*r*) As under the customary law and with the like consequences: see p. 419 *supra*.

(*s*) See Report, Pearce Higgins, 581.

(*t*) *See ante*, p. 418.

(*u*) Art. 39.

(*v*) See Report, Pearce Higgins, 586; and as to the criteria of destination, Art. 31, and p. 441, *supra*.

taken as conclusive proof of the voyage on which she is engaged, yet this is, as we have seen, subject to exception in a case where the facts show the papers to be false (*y*). But "conditional contraband" is not to be liable to capture except when found on board a vessel which is itself bound either for territory belonging to or occupied by the enemy or for his armed forces, and when it is not to be discharged at an intervening neutral port (*z*), and subject in any case to proof of an intended military use (*a*). And here, again, the ship's papers are to be taken as conclusive both as to the voyage of the vessel, and the place of discharge of the goods, unless the facts show them to be false (*b*). The only exception to this general immunity of "conditional contraband" when on a genuine neutral destination—and the only instance, therefore, in which the "doctrine of continuous transport" remains applicable under the Declaration, as regards conditional contraband—occurs in the case where the country of the enemy has no seaboard (*c*); an exception which is no doubt founded on the example of the Boer Republics in the South African war. In January, 1912, during the Turco-Italian war, the *Carthage*, a French mail steamer, then on a voyage from Marseilles to Tunis, was seized by an Italian cruiser and sent into Cagliari, on a charge of carrying an aeroplane and also specie destined for the Turkish forces in Tripoli. In the result, and inasmuch as these objects constituted only conditional contraband which could not be seized when on a neutral destination, the vessel was released; the question of compensation for the seizure being reserved for subsequent settlement.

VISIT AND SEARCH—CONVOY.

THE "MARIA."

1799; 1 C. Rob. 340; Tudor, Leading Cases in Maritime Law, 889.

Case. During war between Great Britain and France, a fleet of Swedish merchantmen, under convoy of a Swedish frigate, was encountered off the coast of England by a British squadron. The fleet included the "Maria" and five other vessels, bound for various ports in the Mediterranean, and laden with cargoes con-

(*y*) See Art. 52; and Report, Pearce Higgins, 587, 589.

(*z*) See Art. 35.

(*a*) The destination for the use of the Government or armed forces of the enemy. As to the presumption of such destination, see p. 142, *supra*.

(*b*) See Art. 35; and Report, Pearce Higgins, 587, 589.

(*c*) See Art. 36; and Parl. Papers, Misc. No. 4 (1909), 96.

sisting of naval stores[a]. The British squadron having proposed to exercise a right of visit and search over the vessels under convoy, the convoying vessel interposed, with the result that the exercise of this right was for some time forcibly resisted, and such resistance only ultimately overcome by the superior force of the British. On this ground both the "Maria" and the other vessels were seized and sent in for adjudication. It subsequently appeared also that these vessels had sailed under convoy for the express purpose of evading British search; and that the convoying vessel had even received instructions to resist it. In these circumstances it was held that the penalty of confiscation attached both to the ships and their cargoes.

Judgment. Sir W. Scott, in his judgment, laid down: (1) That the right of visiting and searching merchant ships on the high seas, whatever the ships, whatever the cargoes, and whatever the destination, was an incontestable right of the lawfully commissioned cruisers of either belligerent. It was, in fact, only by the exercise of this right that it was possible to ascertain whether there was just cause of capture. The right must be exercised with as little vexation to the neutral as possible, but however softened it rested at bottom on force, although a lawful force. (2) That such a right could not be legally varied by the forcible interposition of the neutral Sovereign. Two Sovereigns might indeed agree, as in some instances they had agreed, that the presence of an armed vessel with their merchant ships should be mutually understood to imply that nothing was to be found in the vessels under convoy inconsistent with amity or neutrality. But no Sovereign could compel the acceptance of such security by force. The only security known to the law of nations which a belligerent possessed, independently of such agreement, was the right of visitation and search. (3) That the penalty for any violent contravention of this right was the confiscation of the property so withheld from visitation and search. That this was so appeared to be evident, both on fair principles of reason, on the authority of Vattel, and from a consideration of the institutes of all great maritime countries.

[a] Such stores being conditional contraband.

Nor were there any special circumstances in the present case, whether arising under treaty or otherwise, which would serve to take it out of the general rule. Cases might, indeed, occur in which a ship would be authorized by the natural right of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing her commission: but when the utmost injury threatened was the being carried into the nearest port for enquiry, subject to a responsibility on the part of the captor for costs and damages if he acted vexatiously, a merchant vessel had no right to take the law into her own hands. For these reasons a decree of condemnation must be pronounced both on ship and cargo [b].

This case decides in effect (1) that the right of visit and search over merchant vessels on the high sea is a necessary incident of the right of maritime capture; and (2) that it cannot be displaced by the intervention of the neutral Sovereign, or by the fact of the vessel being under convoy. Incidentally it touches also on the remedy available in cases where a captor exercises his rights unwarrantably or vexatiously [c].

With respect to visit and search, the general nature of this right and the conditions of its exercise have already been described [d]. Whilst a neutral vessel is bound to submit to visit and search by a qualified belligerent, a mere attempt to evade it, as by flight, unaccompanied by actual resistance, will not suffice to warrant her condemnation, although it would justify the belligerent in using all necessary force to prevent her from escaping [e]. Even forcible resistance, moreover, might, as is pointed out in the judgment, be justified by any gross abuse of power on the part of the captor [f]. In any other case, however, it will involve both ship and cargo in a common condemnation [g]. But resistance by an enemy ship will not in general affect neutral cargo that may be on board, for the reason that resistance is always justifiable as between enemies; although according to the British practice this will not apply where neutral goods are shipped on board an armed vessel of the enemy [h]. On all these points, save the last [i], and now on the question of convoy [k], the American practice agrees

[a] This judgment was subsequently affirmed on both points by the Court of Appeal: see *The Ida*, 4 C. Rob. 198.

[b] On this point see also *The Maria* and *La Positiva Ca.*, 5 C. Rob. 365, where damages were awarded by the Court against British captors for subjecting the captured crew to "restraints not absolutely necessary to the security of the captors."

[c] *Supra*, p. 184-5.

[d] *The Maria* (1 Edw. 207).

[e] *Supra*.

[f] *The Elsebe*, 5 C. Rob. 173).

[g] See p. 389, *infra*.

[h] *Ibid.*

[i] *Ibid.*, p. 182.

with the British (*l*). The right of visit and search, with its customary incidents, is equally recognized although with a reservation of the right of convoy under the Continental practice (*m*).

With respect to the so-called "right of convoy," this appears to have had its origin in treaties made between particular States, under which merchant vessels belonging to either party, being neutral and under convoy of a national warship, were exempt from visit and search by the other; the presence of the convoying vessel being understood to afford a guarantee that they were not engaged in any unlawful traffic (*n*). Later, a claim to exemption by right of convoy was put forward as one already authorized by custom; although at the time there was probably no custom which was either sufficiently general or uniform to rank as obligatory. Hence Great Britain continued, as we have seen, to assert and enforce the usual right of visit and search, in despite of convoy. So, in 1800, the "Freya," a Danish frigate, was captured for having forcibly interposed to prevent the visit and search of vessels under her convoy; although in the result the vessel was restored by arrangement with Denmark (*o*). The right of convoy was one of the claims included in the Declaration of the Second Armed Neutrality, 1800 (*p*). It was, moreover, for a short time, recognized by Great Britain, although only by virtue of Conventions concluded with particular States in return for concessions (*q*), and even then subject to reasonable safeguards (*r*). But these Conventions were later rescinded; with the result that Great Britain reverted wholly to the earlier practice. For some time after 1815, however, there was but little occasion for its exercise. In 1854, during the war with Russia, the right of search as regards vessels under neutral convoy was expressly waived (*s*). Subsequently the Declaration of Paris, 1856, by exempting enemy goods not being contraband from seizure under the neutral flag, greatly diminished the importance and scope of the British rule in derogation of the right of convoy. Nevertheless, the right of search, in despite of convoy, is formally asserted in the Manual of Naval Prize Law, 1888 (*t*), and would still be recognized by the Courts, unless excluded by Instructions issued to the Naval Forces.

(*l*) Wheaton, Dana, 688 (*n*); *Fox* [illegible] (36 Court of Claims, 291; Scott, 879). A comprehensive statement of the views of European writers on this subject will be found in Hackett, ii 257.

(*m*) These are fragments of what to this [illegible] especially towards the close of the [illegible] century, although [illegible] Powers [illegible] United States [illegible]

(*n*) Ib. ii. 263, n.; Woolsey [illegible] 171. [illegible] 129.

(*o*) By Conventions made with the Baltic Powers in 1801 and 1802.

(*p*) These are noteworthy as having probably laid the foundation of the right as now recognized by Convention: see Atherley-Jones, Commerce in War, 331.

(*q*) Owing to the difficulty that would otherwise have existed in [illegible] general co-operation with [illegible] by whom the right of convoy was [illegible] recognized: see Lord Palmerston's Minute, No. 1, 1854, 2 State Papers, 7, 118, 119; [illegible] this Manual is now withdrawn.

The view of the American Courts and writers on this point agrees in substance with the British view (*u*). In practice, however, this was largely qualified by treaties made by the United States Government with other Powers, under which the right of convoy was recognized, subject to certain safeguards; whilst more recently it has been adopted as a settled rule and in this form embodied in the Naval War Code of 1900 (*x*). By most European Powers, also, the right of convoy has long been recognized. Indeed, an examination of the Memoranda presented by the various Powers that took part in the Naval Conference, 1908, shows it to have been accepted by all the leading maritime States with the exception of Great Britain (*y*). By the great majority of jurists, moreover, other than the British and American, the "right of convoy" is accepted as a settled principle (*yy*).

In view of this general recognition, and having regard to the diminished importance of her own rule owing to the changes wrought by the Declaration of Paris (*z*), Great Britain, on the occasion of the Naval Conference, 1908, expressed her willingness to recognize the "right of convoy" (*a*); with the result that rules adopting and regulating it are now embodied in the Declaration of London. Nor, even apart from that Declaration, is it probable that Great Britain would now revert to the earlier practice. Nevertheless, "the right of convoy" is at bottom one of questionable expediency, by reason of the difficulty of guarding against fraud and the consequent danger of its leading to friction between belligerents and neutrals. It is, however, regarded by some as unlikely to be largely taken advantage of in practice (*b*).

Another question which has arisen in connection with convoy—although in this case the convoy is belligerent and not neutral—is as to the liability incurred by neutral vessels that make use of enemy convoy; a question very similar in its nature to that raised by the shipping of neutral goods on board an armed vessel of the enemy (*c*). In 1810 a controversy arose on this subject between the United States and Denmark. During the war then prevailing between Great Britain and Denmark, France being at the time in alliance with the latter, a number of American vessels bound for Russian ports made use of British convoys, with the object of escaping visit and search on the part of cruisers belonging to the other belligerents. In March, 1810, the Danish Government issued Instructions declaring all vessels which had made use of British convoy

(*u*) See *The Nancy* (27 C. C. 99; Scott, 861); *The Sea Nymph* (36 C. C. 369; Scott, 869); Wheaton (Dana), 692, n.

(*x*) See Art. 39, whereby a declaration of the commander of the convoying vessel based on a thorough examination, is accepted in lieu of search.

(*y*) See Parl. Papers, Misc. No. 5 (1909), p. 78; although in the case of Japan it is subject to exception in circumstances of grave suspicion.

(*yy*) In 1885 it was adopted also by the Institute of International Law.

(*z*) *Supra*, p. 481.

(*a*) See Parl. P. Misc. No. 4 (1909), 25.

(*b*) See p. 485, *infra*.

(*c*) See p. 389, *supra*.

either in the Atlantic or the Baltic to be good prize. Under these Instructions a number of American vessels that had made use of British convoy were seized, and some eighteen of them condemned as prize by the Danish Prize Courts, without any proof of active resistance to visit and search. The United States Government protested against this proceeding; contending that so long as the association of the neutral vessel with the enemy convoy was not accompanied by any attempt at concealment or deceit, or by any participation in the resistance of the convoying force, she did not lose her neutral character. To this Denmark replied that the use of belligerent convoy showed a settled intention to resist visit and search, and that a neutral thereby ranged himself on the side of the enemy and renounced the advantages of the friendly or neutral character. In the result, and after negotiations extending over twenty years, an indemnity was paid by Denmark, although subject to a proviso that this should not be drawn into a precedent (*d*). The contention put forward by the American Government in this case agrees with the doctrine of the American Courts (*e*). Judging this question in the light of general principles, it would seem that the fact of a neutral vessel having made use of enemy convoy would in itself be a good ground for detention and enquiry: and that the fact of such a vessel having been arrested whilst under enemy convoy, and after resistance on the part of the latter, would afford just ground for condemnation, both as evincing an intention to resist visit and search and on the ground of hostile association. And this appears to accord with the British practice (*f*), and also with the views of the leading British and American writers (*g*).

General Notes. *The Right of Visit and Search.*—The existence of this right is so universally recognized as to need no affirmation by Convention. But in the matter of the liability incurred by a neutral for resisting it, the Declaration of London now provides that forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, shall involve in all cases the condemnation of the vessel; that the cargo on board shall be liable to the same treatment as cargo found on board an enemy vessel (*h*); and that goods belonging to the master or owner of the vessel shall be treated as enemy property (*i*). In effect this confirms the customary law on the subject, although with some mitigation as regards the liability of cargo. Under the Declaration, for instance, enemy goods would still be

(*d*) See Wheaton, Dana, 699 *et seq.*; and Moore, Digest, vii. 195 *et seq.*

(*e*) See *The Nereide*, 9 Cranch, ii. 388; and *The Peterhoff*, 5 Wall. at. 169; but see also the dissenting judgment of Story, J., in *The Nereide*; and *The Sea Nymph*, 36 Congress 1 Claims, 369. For a full discussion of the American case, see Moore, Digest, vii. 196 *et seq.*

(*f*) See Manual of Naval Prize Law, Art. 150, which recites that vessels under enemy convoy are from that circumstance alone liable to detention.

(*g*) Including Kent, Dana, and Woolsey; see Hall, 736, n.

(*h*) As to the consequences of this, see *ante*, p. 157.

(*i*) Art. 63.

condemned, for the reason that the protection of the neutral flag can no longer be claimed, as would also goods belonging to the master and owner of the vessel, even though neutral; but neutral goods, not being contraband, would now go free, subject only to proof of their neutral character (*k*). As under the customary law, a mere attempt to escape, although exposing the vessel and those on board to the risk of hostile measures, will not in itself be a ground of condemnation (*l*).

The Right of Convoy.—On this subject the Declaration of London provides that neutral vessels under the convoy of warships of their own nationality shall be exempt from search (*m*); the theory being that the neutral Government by placing the vessels under convoy assumes responsibility and guarantees that they are not engaged in any venture which is inconsistent with their neutrality. If encountered by a belligerent cruiser, the commander of the convoying vessel must give in writing all information that could be obtained by search, both as to the character of the vessels and their cargoes (*n*). In the event of the belligerent suspecting that the confidence of the neutral commander has been abused (*o*), he must make known his suspicions and ask for further investigation. In this case it will rest with the commander of the convoy alone to make such investigation (*p*), although he may, if he thinks fit, allow an officer of the belligerent warship to be present at the investigation (*q*); but in any case the results of the investigation must be embodied in a written report and a copy handed to the latter (*r*). In the event of any difference of opinion—as might conceivably occur in relation to what constitutes "conditional contraband"—the belligerent officer can do no more than enter his protest, leaving the matter to be settled by diplomatic means (*s*). But if, in the opinion of the commander of the convoy, the results of the investigation are such as would justify the capture of any vessel under his convoy, then the protection of the convoy must be withdrawn, and the belligerent must be allowed to send the suspected vessel in for adjudication. The effect of these provisions is thus to affirm generally the right of convoy, subject to conditions that are designed to safeguard belligerent rights. The initial provision, construed in the light of the official report, would appear to impose on all neutral Governments that avail themselves of the right a correlative duty of exercising a genuine supervision over the quality of the vessels under convoy, with a view to preventing any abuse of the privilege (*t*). The written statement required to be furnished to the belligerent by the com-

(*k*) See Report, Proc. Higgins, [illegible] contraband.
609. Art. 42
(*l*) See Report, Proc. [illegible] 608 Higgins.
Art. 61. 607.
(*m*) Art. 61.
(*n*) Art. 62.
(*o*) See Report, Proc. Higgins
[illegible] 647.
(*p*) See Report, [illegible]

mander of the convoying vessel, is intended at once to emphasize this responsibility, and to prevent any ambiguity or misunderstanding. It still remains to be seen, however, how far these safeguards will prove effectual in practice (*w*). At the same time, even if the "right of convoy" should be finally accepted, it is thought to be unlikely that it will be largely resorted to in practice, owing to the difficulty that exists under modern conditions of uniting in one body a number of vessels of different rates of speed (*x*).

Compensation. The Declaration of London also makes provision with respect to the compensation of neutral owners in cases where the seizure proves to have been unjustifiable or irregular. As to this, the Declaration itself merely provides that if the capture of the vessel or goods is not upheld by the Prize Court, or if the prize is released without any decision being given, then the parties interested shall be entitled to compensation, unless it can be shown that there were good reasons for effecting the capture (*y*). In effect, if the case proceeds to adjudication, it will be the duty of the national Prize Court to determine this question, subject to an appeal to the International Prize Court; whilst if the vessel is released by executive action, and if in such a case the national Courts have no jurisdiction (*z*), then any claim for compensation will have to be pursued by diplomatic means (*a*). No provision is made as to the manner in which damages shall be assessed, this being left to the discretion of the Court or other determining body. But no compensation will be due, even though the vessel or cargo is ultimately released, if there was reasonable cause for capture; as where the necessary proofs of non-liability were not furnished until after the arrest, or where papers relating to the ship or cargo were suppressed or destroyed, or where false or double papers were used (*b*). The principles on which compensation is given and assessed under the British prize system have already been considered (*c*).

The Destruction of Neutral Prizes: (i.) *Under the Customary Law.* Under the customary law, enemy vessels taken as prize are, as we have seen, liable to be destroyed in case of necessity or emergency; although even here the legality of the proceeding must subsequently be adjudicated on by the Prize Court (*d*). With respect to neutral vessels, according to the British practice, the primary rule is that such vessels, or indeed any vessels whose nationality is doubtful, must, if circumstances prevent their being brought in for adjudication, be released (*e*). But to this there appears to

(*w*) *Supra*, p. 482.

(*x*) See Hall, 730.

(*y*) Art. 64.

(*z*) As under the British system, where the Courts have so far no power to award damages except as incident to a prize suit, although such a jurisdiction will probably be given in the event of the Declaration of London being adopted: see the Naval Prize Bill, 1911, s. 21.

(*a*) See Report, Pearce Higgins, 610.

(*b*) See Report, *ibid.* 611.

(*c*) *Supra*, pp. 181, 187.

(*d*) See p. 186, *supra*.

(*e*) See Manual of Naval Prize Law, Art. 303; *The Leander* (Spinks, 217).

be linked an ancillary rule, which legalizes, or at any rate contemplates, destruction in cases of grave importance or honest error(*f*): subject, however, to an obligation on the part of the captor (*g*) to make full restitution in value to the owners of both vessel and cargo (*h*). This view proceeds on the principle that the neutral title is only divested by condemnation, prior to which the captor has no right beyond that of sending the vessel in for adjudication. And with this the practice of certain other countries, such as Holland and Japan, appears to agree (*i*). But according to the practice of most other States—including France, Germany, Russia and the United States(*k*) —the right of a captor to destroy his prize extends also to neutral vessels, if the circumstances are such that the prize cannot be brought in for adjudication without risk to the captor (*l*). And this view is naturally upheld by Powers not possessing over-sea ports or stations, for the reason that a prohibition to destroy neutral prizes would, unless neutral ports were opened up for their reception, place such Powers at a great disadvantage in maritime war. The question came under discussion at the Hague Conference of 1907, but no agreement was arrived at. The exercise of this right by Russia during the Russo-Japanese war (*m*), provoked much dissatisfaction. At the Naval Conference of London the question again came up for discussion, and on this occasion an agreement was come to on the basis of Great Britain conceding a right of destruction in cases of exceptional necessity, subject to the imposition of certain safeguards against abuse. The results of this agreement are now embodied in the Declaration of London, 1909.

ii. *Under the Declaration of London.* The Declaration first lays it down as a general rule that a neutral vessel which has been captured must not under ordinary circumstances be destroyed, but must be brought in for adjudication (*o*). By way of exception, however, it is provided that a neutral prize may be destroyed if the captor can prove that she would in fact have been liable to condemnation if she had been brought in (*p*), and also that she could not be

(*f*) See *The Actæon*, 2 Dods. 48;.

(*g*) Save, of course, in cases where the destruction was due to some fault or connivance on the part of those responsible for the action of the vessel.

(*h*) See *The Felicita* (2 Dods. 381); and p. 177, *supra*.

(*i*) See Parl. Papers, Misc. No. 5 (1909), p. 101; but see also the Japanese Naval Regulations of 1904, Takahashi, 788.

(*k*) See Parl. Papers, Misc. No. 5 (1909), p. 99 *et seq.*, and the U. S. Naval War Code, Art. 50; although the view of American writers appears to accord with that of the British Prize Courts: Taylor, 786.

(*l*) These conditions vary somewhat, but include generally the unnavigability of the prize, the risk of capture, and inability to spare a prize crew.

(*m*) As in the cases of *The Knight Commander*, p. 437, *supra*, and *The Hipsang*, *The Hiburi*, *The St. Kilda* (British), *The Thea* (German), and *The Princess Maria* (Danish), as to which see Lawrence, War and Neutrality, 250 *et seq.*

(*o*) See Art. 48; and as to how far neutral ports may be used for this purpose, H. C., No. 13 of 1907, Art. 23; and p. 363, *supra*.

(*p*) As would be the case where more than half her cargo was contraband.

brought in for adjudication without endangering the safety of the captor or the success of his operations at the time (*q*); the onus of proof, as regards each of these conditions, resting on the captor, and the determination resting with the national Prize Court, subject to a right of appeal to the International Court (*r*). In any case, moreover, before the prize is destroyed all persons on board must be placed in safety, and all the ship's papers and other relevant documents be taken on board the warship (*s*). All neutral goods of an innocent character which are involved in the destruction of the vessel must be paid for (*t*). In their practical application these rules appear to work out as follows:—(1) If the captor fails to show that the destruction was forced on him by exceptional necessity, then the owners of both vessel and cargo, even though these may prove to have been liable to condemnation, will be entitled to compensation (*u*). There is no definition of "exceptional necessity" other than the provision contained in Art. 49 (*x*), it having been thought better to leave the determination of this question to the discretion of the Prize Court, with the usual right of appeal. (2) Even if the captor succeeds in proving "exceptional necessity," he will still be bound to make compensation, unless he can also show that the vessel would have been subject to condemnation (*y*). (3) In any case, the captor will have to pay compensation for any neutral goods of an innocent character that were involved in the destruction (*z*). These provisions were thought to provide an adequate safeguard against the reckless destruction of neutral prizes by belligerents; some Powers indeed regarding them as over stringent, and as amounting virtually to a renunciation of the right of destruction as it obtained under the Continental practice. Nevertheless, assuming these rules to be generally accepted, it still remains to be seen how far they will prove effectual in practice; whilst, even if the conditions as regards compensation are fully observed, it needs to be remembered that in the conditions of modern trade a legal right to compensation (*a*) is rarely an equivalent for the loss of either ship or cargo.

The Destruction of Contraband Cargo.—The Declaration of London further provides that if a neutral vessel is found carrying goods liable to condemnation in circumstances where the vessel herself would not be liable to condemnation (*b*), and the captor is prevented from bringing her in for adjudication by causes similar to those previously mentioned (*c*), he may require the surrender of the noxious goods and may thereupon destroy them, subject to his

(*q*) Art. 49.

(*r*) Art. 51: see Report, Pearce Higgins, 598.

(*s*) Art. 50.

(*t*) Art. 53.

(*u*) Art. 51: see Report, Pearce Higgins, 598.

(*x*) That is, the existence of circumstances calculated to endanger the safety of the captor or the success of his operations.

(*y*) Art. 52.

(*z*) Art. 53.

(*a*) As provided by Art. 53.

(*b*) As where she carries contraband amounting to less than half her cargo.

(*c*) Art. 49: *supra*.

making entry thereof in the log-book and taking certified copies of all relevant papers, after which the vessel is to be allowed to continue her voyage. But this proceeding is subject to the same conditions as regards proof before the Prize Court both of the captor's inability to bring in the vessel and of the liability of the property to condemnation—as those which attach to the destruction of neutral prizes (*d*). These provisions are entirely novel, but were thought to be the logical outcome of certain antecedent provisions. Thus by Art. 44, it will be remembered, a captor may, in cases of contraband carriage and when the vessel herself is not liable to condemnation, accept the surrender of the contraband as an alternative to sending the vessel in for adjudication, if this is mutually agreed to (*e*); whilst by Art. 49 he may, in a case where the vessel is herself liable to condemnation and he is prevented from sending her in for adjudication by reason of exceptional necessity, destroy both vessel and cargo (*f*). It may happen, however, that contraband is found on a vessel in less proportion than one-half of the total cargo; an amount which would not warrant either the condemnation of the vessel if she were brought in for adjudication or her destruction in a case where necessity prevented the captor from sending her in. In such a case it was thought reasonable that the captor should at any rate have the right of destroying the noxious goods, subject to proper attestation of the fact and to the matter being subsequently adjudicated on by the Prize Court (*g*).

(*d*) Arts. 54, 51, 52; see Report, Pearce Higgins, 599.

(*e*) *Supra*, p. 445-6.

(*f*) *Supra*, p. 487.

(*g*) See Parl. Papers (1909), Misc. No. 4, pp. 52, 97.

APPENDICES.

No. I.

THE HAGUE CONVENTION RELATIVE TO THE OPENING OF HOSTILITIES. No. 3 of 1907 (*a*).

1. The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war.

2. The existence of a state of war must be notified to the neutral Powers without delay, and shall not be held to affect them until after the receipt of a notification, which may, however, be given by telegraph. Nevertheless, neutral Powers may not rely on the absence of notification if it be established beyond doubt that they were in fact aware of the existence of a state of war.

3. Article 1 of the present Convention shall take effect in case of war between two or more of the Contracting Powers. Article 2 applies as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention.

(*a*) In the case both of this and other Conventions the formal parts are omitted; as are also the provisions relating to ratification, adhesion, denunciation, and their respective dates of operation, and mode of registration, for the common form of which see No. 2 of 1907, Arts. 3–7, vol. i. pp. 372–373. The translation is based on, but by no means identical with, that given in Parliamentary Papers, Misc. No. 6 (1908), and No. 4 (1909), as to which see vol. i. 349 n. (*a*).

No. II.

HAGUE CONVENTION CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND, No. 4 of 1907 (*a*).

1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

4. The present Convention, duly ratified, shall replace, as between the Contracting Powers, the Convention of the 29th July, 1899, respecting the Laws and Customs of War on Land. The Convention of 1899 remains in force as between the Powers which signed it, but which do not ratify the present Convention.

Regulations respecting the Laws and Customs of War on Land.

Section I. Of Belligerents.

Chapter I. The Status of Belligerent.

1. The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions: (1) They must be commanded by a person responsible for his subordinates; (2) They must have a fixed distinctive sign recognizable at a distance; (3) They must carry arms openly; and (4) They must conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

2. The inhabitants of a territory not under occupation, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves

(*a*) See p. (*a*), p. 489, *supra*.

in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

3. The armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war.

CHAPTER II. PRISONERS OF WAR.

4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property.

5. Prisoners of war may be interned in a town, fortress, camp, or other place, and are bound not to go beyond certain fixed limits; but they cannot be placed in confinement except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

6. The State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive and shall have no connection with the operations of the war. Prisoners may be authorized to work for the public service, for private persons, or on their own account. Work done for the State is paid for at rates proportional to the work of a similar kind executed by soldiers of the national army, or, if there are no such rates in force, at rates proportional to the work executed. When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities. The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, deductions on account of the cost of maintenance excepted.

7. The Government into whose hands prisoners of war have fallen is charged with their maintenance. In default of special agreement between the belligerents, prisoners of war shall be treated as regards rations, quarters, and clothing on the same footing as the troops of the Government which captured them.

8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in the power of which they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary. Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of their previous escape.

9. Every prisoner of war is bound to give, if questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

10. Prisoners of war may be set at liberty on parole if the laws of their country allow it, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by which they were made prisoners, the engagements they may have contracted. In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

11. A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of a prisoner to be set at liberty on parole.

12. Prisoners of war liberated on parole and recaptured bearing arms against the Government to which they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and may be put on trial before the Courts.

13. Individuals following an army without directly belonging to it, such as newspaper correspondents or reporters, sutlers or contractors, who fall into the enemy's hands and whom the latter thinks it expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

14. A bureau for information relative to prisoners of war is instituted at the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents on their territory. The business of this bureau is to reply to all inquiries about the prisoners, to receive from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as all other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The bureau must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace. It is also the business of the information bureau to gather and keep together all personal effects, valuables, letters, &c., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

15. Societies for the relief of prisoners of war, if properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort, shall receive from the belligerents, for themselves and their duly accredited agents, every facility for the efficient performance of their humane task within the bounds imposed by military exigencies and administrative regulations. Representatives of these societies, when furnished with a personal permit by the military authorities, may, on

giving an undertaking in writing to comply with all measures of order and police which they may have to issue, be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners.

16. Information bureaux enjoy the privilege of free carriage. Letters, money orders, and valuables, as well as postal parcels, intended for prisoners of war, or dispatched by them, shall be exempt from all postal charges in the countries of origin and destination, as well as in the countries they pass through. Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as any payment for carriage by State railways.

17. Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained; the amount shall be refunded by their own Government.

18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of their own Church, on the sole condition that they comply with the police regulations issued by the military authorities.

19. The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army. The same rules shall be followed as regards certificates of death and also as to the burials of prisoners of war, due regard being paid to their grade and rank.

20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

CHAPTER II. THE SICK AND WOUNDED.

21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

SECTION II. OF HOSTILITIES.

CHAPTER I. MEANS OF INJURING THE ENEMY, SIEGES, AND BOMBARDMENTS.

22. The right of the belligerents is not unlimited as regards the adoption of means of injuring the enemy.

23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden—(a) To employ poison or poisoned weapons; (b) to kill or wound by treachery individuals belonging to the hostile nation or army; (c) to kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion; (d) to declare that no quarter will be given; (e) to employ arms, projectiles, or material calculated to cause unnecessary suffering; (f) to make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as of the distinctive signs of the Geneva Convention; (g) to destroy or seize enemy property, unless such destruction or seizure be imperatively demanded by the necessities of

war; (h) to declare extinguished, suspended, or unenforceable in law, the rights and rights of action of enemy subjects. A belligerent is likewise forbidden to compel enemy subjects to take part in the operations of war directed against their own country, even if they were in the service of the belligerent before the commencement of the war.

24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

25. The attack or bombardment, by any means whatever, of undefended towns, villages, dwellings, or buildings, is forbidden.

26. The officer in command of an attacking force must do all in his power to warn the authorities before commencing a bombardment, except in cases of assault.

27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

28. The giving over to pillage of a town or place, even when taken by assault, is forbidden.

CHAPTER II. SPIES.

29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Accordingly, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies:—Soldiers and civilians intrusted with the delivery of despatches intended either for their own army or for the enemy's army, and carrying out their mission openly. To this class likewise belong persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

30. A spy taken in the act shall not be punished without previous trial.

31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts as a spy.

CHAPTER III. FLAGS OF TRUCE.

32. A person is regarded as bearing a flag of truce who has been entrusted by one of the belligerents to enter into communication

with the other, and who presents himself under a white flag. He is entitled to inviolability, as also the trumpeter, bugler or drummer, the flag-bearer and the interpreter who may accompany him.

33. The commander to whom a flag of truce is sent is not obliged in every case to receive it. He may take all steps necessary in order to prevent the envoy from taking advantage of his mission to obtain information. In case of abuse, he has the right temporarily to detain the envoy.

34. The envoy loses his rights of inviolability if it is proved in a positive and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery.

CHAPTER IV.—CAPITULATIONS.

35. Capitulations agreed upon between the contracting parties must take into account the rules of military honour. Once settled, they must be scrupulously observed by both parties.

CHAPTER V.—ARMISTICES.

36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

37. An armistice may be general or local. The first suspends the entire military operations of the belligerent States; the second between certain portions of the belligerent armies only and within a fixed zone.

38. An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or at the time fixed.

39. It rests with the contracting parties to settle, in the terms of the armistice, what relations may be had by them, within the theatre of war, with the civil population and with each other.

40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

41. A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders and, if necessary, compensation for the losses sustained.

SECTION III. MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE.

42. Territory is considered occupied when actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

43. The authority of the legitimate Power having passed in fact into the hands of the occupant, the latter shall do all in his power to re-establish and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.

44. A belligerent is forbidden to compel the inhabitants of territory occupied by him to furnish information about the army of the other belligerent, or about his means of defence.

45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected. Private property may not be confiscated.

47. Pillage is expressly forbidden.

48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls payable to the State, he shall do so, as far as is possible, in accordance with the rules of assessment and distribution in force at the time, and shall in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as the national Government was bound.

49. If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this must only be for the needs of the army or the administration of the territory in question.

50. No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.

51. No contribution shall be collected except under a written order, and on the responsibility of a general in command. The contribution shall be levied, as far as possible, in accordance with the rules as to the assessment and incidence of taxes in force at the time. For every contribution a receipt shall be given to the contributories.

52. Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Supplies in kind shall as far as is possible be paid for in ready money; if not, a receipt shall be given and payment of the amount due shall be made as soon as possible.

53. An army of occupation shall only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations. Apart from cases governed by naval law, all apparatus adapted for the transmission of news, or for the conveyance of persons or goods, whether on land, at sea, or in

the air, depôts of arms, and, in general, all kinds of war material may be seized, even though they belong to private individuals, but they must be restored, and the indemnities for them regulated, on the conclusion of peace.

54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They also must be restored and indemnities paid for them on the conclusion of peace.

55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, landed property, forests, and agricultural undertakings belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of such properties, and administer them in accordance with the rules of usufruct.

56. The property of local authorities, as well as that of institutions dedicated to public worship, charity, education, and to science and art, even when State property, shall be treated as private property. Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of legal proceedings

No. III.

HAGUE CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS AND PERSONS IN WAR ON LAND, No. 5 OF 1907 (*a*).

CHAPTER I.—THE RIGHTS AND DUTIES OF NEUTRAL POWERS.

1. THE territory of neutral powers is inviolable.

2. Belligerents are forbidden to move troops or convoys, whether of munitions of war or of supplies, across the territory of a neutral Power.

3. Belligerents are likewise forbidden to:—(a) erect on the territory of a neutral Power a wireless telegraphy station or any apparatus for the purpose of communicating with belligerent forces on land or sea; (b) use any installation of this kind established by them for purely military purposes on the territory of a neutral Power before the war, and not previously opened for the service of public messages.

4. Corps of combatants must not be formed, nor recruiting agencies opened, on the territory of a neutral Power, on behalf of the belligerents.

5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not bound to punish acts in violation of neutrality unless such acts have been committed on its own territory.

6. A neutral Power will not incur responsibility merely from the fact that persons cross the frontier individually in order to place themselves at the service of one of the belligerents.

7. A neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet.

8. A neutral Power is not bound to forbid or restrict the use on behalf of belligerents of telegraph or telephone cables, or of wireless telegraphy apparatus, whether belonging to it, or to companies or to private individuals.

9. A neutral Power must apply impartially to the belligerents every restriction or prohibition which it may enact in regard to the matters referred to in Articles 7 and 8. The neutral Power shall see that the same obligation is observed by companies or private

(*a*) See n. (*a*), p. 489, *supra*.

owners of telegraph or telephone cables or wireless telegraphy apparatus.

10. The fact that a neutral Power repelling, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.

CHAPTER II.—INTERNMENT OF BELLIGERENTS AND CARE OF THE WOUNDED IN NEUTRAL TERRITORY.

11. A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible at a distance from the theatre of war. It may keep them in camps and may even confine them in fortresses or in places set apart for the purpose. It should decide whether officers may be left free on giving their parole not to leave the neutral territory without permission.

12. In default of special agreement, the neutral Power shall supply the interned with the food, clothing, and relief which the dictates of humanity prescribe. At the conclusion of peace the expenses caused by the internment shall be made good.

13. A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence. The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

14. A neutral Power may authorize the passage into its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains or other methods of transport by which they are conveyed shall carry neither combatants nor war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose. The sick and wounded of one belligerent brought under these conditions into neutral territory by the other belligerent must be so guarded by the neutral Power as to ensure their taking no further part in the military operations. The same duty shall devolve on the neutral Power with regard to the sick and wounded of the other army who may be committed to its care.

15. The Geneva Convention applies to the sick and wounded who are interned in neutral territory.

CHAPTER III. NEUTRAL PERSONS.

16. The subjects or citizens of a State which is not taking part in the war are deemed neutrals.

17. A neutral cannot claim the benefit of his neutrality: (a) If he commits hostile acts against a belligerent; (b) If he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties. In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a subject or citizen of the other belligerent State could be for the same act.

18. The following shall not be considered as acts committed in favour of one belligerent within the meaning of Article 17 (b): (a) The furnishing of supplies or the making of loans to one of the belligerents, provided that the person so doing neither lives in the territory of the other party nor in territory occupied by it, and that the supplies do not come from such territory; (b) Services rendered in matters of police or civil administration.

CHAPTER IV.— RAILWAY MATERIAL.

19. Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except in so far as is absolutely necessary. It shall be sent back as soon as possible to the country of origin. A neutral Power may likewise, in case of necessity, retain and utilize to a corresponding extent railway material coming from the territory of the belligerent Power. Compensation shall be paid on either side in proportion to the material used and to the period of usage.

CHAPTER V.—FINAL PROVISIONS.

20. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

No. IV.

HAGUE CONVENTION RELATIVE TO THE STATUS OF ENEMY MERCHANT SHIPS AT THE OUTBREAK OF HOSTILITIES. No 6 of 1907 (*a*).

1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities had broken out.

2. A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

3. Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers. After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war.

4. Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship. The same principle applies in the case of cargo on board the vessels referred to in Article 3.

5. The present Convention does not refer to merchant ships which show by their build that they are intended for conversion into war ships.

6. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

(*a*) See n. (*a*), p. 489, *supra*.

No. V.

HAGUE CONVENTION RELATIVE TO THE CONVERSION OF MERCHANT SHIPS INTO WAR SHIPS, No. 7 of 1907 (*a*).

1. No MERCHANT ship converted into a war ship shall have the rights and duties appertaining to vessels having that status unless it is placed under the direct authority, immediate control, and responsibility of the Power, the flag of which it flies.

2. Merchant ships converted into war ships must bear the external marks which distinguish the war ships of their nationality.

3. The commander must be in the service of the State and duly commissioned by the proper authorities. His name must figure on the list of the officers of the fighting fleet.

4. The crew must be subject to military discipline.

5. Every merchant ship converted into a war ship is bound to observe in its operations the laws and customs of war.

6. A belligerent who converts a merchant ship into a war ship must, as soon as possible, announce such conversion in the list of its war ships.

7. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

(*a*) See n. (*a*), p. 489, *supra*.

No. VI.

HAGUE CONVENTION RELATIVE TO THE LAYING OF AUTOMATIC SUBMARINE CONTACT MINES, No. 5 OF 1907 (*a*).

1. It is forbidden: (1) To lay unanchored automatic contact mines, unless they be so constructed as to become harmless one hour at most after the person who laid them has ceased to control them; (2) To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings; (3) To use torpedoes which do not become harmless when they have missed their mark.

2. The laying of automatic contact mines off the coast and ports of the enemy with the sole object of intercepting commercial shipping, is forbidden.

3. When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping. The belligerents undertake to do their utmost to render these mines harmless after a limited time has elapsed, and, should the mines cease to be under observation, to notify the danger zones as soon as military exigencies permit, by a notice to mariners, which must also be communicated to the Governments through the diplomatic channel.

4. Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents. The neutral Power must give notice to mariners in advance of the places where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.

5. At the close of the war, the Contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines. As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

6. The Contracting Powers which do not at present own perfected mines of the description contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the

(*a*) See n. (*a*), p. 489, *supra*.

matériel of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

7. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

11. The present Convention shall remain in force for seven years, dating from the sixtieth day after the date of the first deposit of ratifications. Unless denounced, it shall continue in force after the expiry of this period. The denunciation shall be notified in writing to the Netherland Government, which shall immediately communicate a duly certified copy of the notification to all the Powers, informing them of the date on which it was received. The denunciation shall only operate in respect of the denouncing Power, and only on the expiry of six months after the notification has reached the Netherland Government.

12. The Contracting Powers agree to reopen the question of the employment of automatic contact mines six months before the expiry of the period contemplated in the first paragraph of the preceding Article, in the event of the question not having been already taken up and settled by the Third Peace Conference. If the Contracting Powers conclude a fresh Convention relative to the employment of mines, the present Convention shall cease to be applicable from the moment when it comes into force.

No. VII.

HAGUE CONVENTION RESPECTING BOMBARDMENTS BY NAVAL FORCES IN TIME OF WAR, No. 9 OF 1907 (*a*).

CHAPTER I. BOMBARDMENT OF UNDEFENDED PORTS, TOWNS, VILLAGES, DWELLINGS, OR BUILDINGS.

1. THE bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden. A place may not be bombarded solely on the ground that automatic submarine contact mines are anchored off the harbour.

2. Military works, military or naval establishments, depôts of arms or war material, workshops or plant which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed. The commander incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances. If for military reasons immediate action is necessary, and no delay can be allowed to the enemy, it is nevertheless understood that the prohibition to bombard the undefended town holds good, as in the case given in the first paragraph, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

3. After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question. Such requisitions shall be proportional to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in ready money; if not, receipts shall be given.

4. The bombardment of undefended ports, towns, villages, dwellings, or buildings, on account of failure to pay money contributions, is forbidden.

(*a*) See n. (*a*), p. 489, *ante*.

CHAPTER II.—GENERAL PROVISIONS.

5. In bombardments by naval forces all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, provided that they are not used at the time for military purposes. It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two painted triangular portions, the upper portion black, the lower portion white.

6. Unless military exigencies render it impossible, the officer in command of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities.

7. The giving over to pillage of a town or place, even when taken by assault, is forbidden.

CHAPTER III.—FINAL PROVISIONS.

8. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

No. VIII.

HAGUE CONVENTION FOR THE ADAPTATION OF THE PRINCIPLES OF THE GENEVA CONVENTION TO MARITIME WAR, No. 10 OF 1907 (*a*).

THE material parts of this Convention, as well as of the Geneva Convention, 1906, have already been set forth (*b*).

(*a*) See n. (*a*), p. 489, *supra*.

(*b*) See pp. 104, 121, *supra*. For the text of the Geneva Convention, 1906, see Pearce Higgins, 18 *et seq.*; and for that of the Hague Convention, No. 10 of 1907, *ibid.* 361 *et seq.*

No. IX.

HAGUE CONVENTION RELATIVE TO CERTAIN RESTRICTIONS ON THE EXERCISE OF THE RIGHT OF CAPTURE IN MARITIME WAR, No. 11 of 1907 (*a*).

CHAPTER I. - POSTAL CORRESPONDENCE.

1. The postal correspondence of neutrals or belligerents, whatever its official or private character, found on board a neutral or enemy ship on the high seas is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay. The provisions of the preceding paragraph do not, in case of violation of blockade, apply to correspondence proceeding to or from a blockaded port.

2. The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of naval war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

CHAPTER II. - EXEMPTION FROM CAPTURE OF CERTAIN VESSELS.

3. Vessels employed exclusively in coast fisheries, or small boats employed in local trade, together with their appliances, rigging, tackle, and cargo, are exempt from capture. This exemption ceases from the moment that they take any part whatever in hostilities. The Contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

4. Vessels employed on religious, scientific, or philanthropic missions are likewise exempt from capture.

CHAPTER III. - REGULATIONS REGARDING THE CREWS OF ENEMY MERCHANT SHIPS CAPTURED BY A BELLIGERENT.

5. When an enemy merchant ship is captured by a belligerent, such of its crew as are subjects or citizens of a neutral State are not made prisoners of war. The same rule applies in the case of

(*a*) See p. 489, *supra*.

the captain and officers, likewise subjects and citizens of a neutral State, if they give a formal undertaking in writing not to serve on an enemy ship while the war lasts.

6. The captain, officers, and members of the crew, if subjects or citizens of the enemy State, are not made prisoners of war, provided that they undertake, on the faith of a formal written promise, not to engage, while hostilities last, in any service connected with the operations of the war.

7. The names of the persons retaining their liberty under the conditions laid down in Article 5, paragraph 2, and in Article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

8. The provisions of the three preceding Articles do not apply to ships taking part in hostilities.

CHAPTER IV.—FINAL PROVISIONS.

9. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

No. X.

HAGUE CONVENTION RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT, No. 12 OF 1907 (*a*).

PART I.—GENERAL PROVISIONS.

1. THE validity of the capture of a merchant ship or its cargo, when neutral or enemy property is involved, is decided before Prize Courts in accordance with the present Convention.

2. Jurisdiction in matters of prize is exercised in the first instance by the Prize Courts of the belligerent captor. The judgments of these Courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

3. The judgments of national Prize Courts may be brought before the International Prize Court (*b*):—(1) When the judgment of the national Prize Courts affects the property of a neutral Power or individual; (2) When the judgment affects enemy property and relates to—(a) cargo on board a neutral ship; (b) an enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim; (c) a claim based upon the allegation that the seizure has been effected in violation, either of a conventional stipulation in force between the belligerent Powers, or of an enactment issued by the belligerent captor. The appeal against the judgment of the national Court can be based on the ground that the judgment was wrong either in fact or in law.

4. An appeal may be brought—(1) By a neutral Power, if the judgment of the national tribunals affects its property or the property of its subjects or citizens (Article 3 (1)), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3 (2) (b)); (2) By a neutral individual, if the judgment of the national Court affects his property (Article 3 (1)), subject, however, to the reservation that the Power to which

(*a*) See n. (*a*), p. 489, *ante*.

(*b*) By an additional Protocol, signed on the 19th September, 1910, by 13 Powers, including Great Britain, France and the United States of America, it is provided that signatory or adhering Powers which are debarred by difficulties of a constitutional kind from accepting this Convention in its present form, may, in ratifying or acceding to it, declare that in prize causes coming within the jurisdiction of their national Courts, recourse to the International Prize Court shall only be had in the form of an action of indemnity for the injury caused by the capture (Art. 1). Other Articles provide for consequent alterations in the procedure as originally prescribed; see p. 195, *post*.

he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place; (3) By an individual subject or citizen of an enemy Power, if the judgment of the national Court affects his property in the cases referred to in Article 3 (2), except that mentioned in paragraph (b).

5. An appeal may also be brought on the same conditions as in the preceding Article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the national Court. Persons so entitled may appeal separately to the extent of their interest. The same rule applies in the case of persons belonging either to neutral States or to the enemy, who derive their rights from and are entitled to represent a neutral Power the property of which was the subject of the decision.

6. When, in accordance with the above Article 3, the International Court has jurisdiction, the national Courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal. If the national Courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

7. If a question of law to be decided is covered by a Treaty in force between the belligerent captor and a Power which is itself, or the subject or citizen of which is, a party to the proceedings, the Court is governed by the provisions of the said Treaty. In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity. The above provisions apply equally to questions relating to the order and mode of proof. If, in accordance with Article 3 (2) (c), the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court shall enforce the enactment. The Court may disregard failure to comply with the procedure laid down in the legislation of the belligerent captor when it is of opinion that its consequences are unjust and inequitable.

8. If the Court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor. If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account. If the national Prize Court pronounced the capture to be null, the Court can only be asked to decide as to the damages.

9. The Contracting Parties undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II. CONSTITUTION OF THE INTERNATIONAL PRIZE COURT.

10. The International Prize Court is composed of judges and deputy judges, who will be appointed by the Contracting Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation. The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

11. The judges and deputy judges are appointed for a period of six years, reckoned from the date on which the notification of their appointment is received by the Administrative Council established by the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899. Their appointments can be renewed. Should one of the judges or deputy judges die or resign, the same procedure is followed in filling the vacancy as was followed in appointing him. In this case, the appointment is made for a fresh period of six years.

12. The judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (Article 11, paragraph 1), and if they sit by rota (Article 15, paragraph 2), according to the date on which they entered upon their duties. When the date is the same, the senior in age takes precedence. The deputy judges when acting are in the same position as the judges. They rank, however, after them.

13. The judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country. Before taking their seat, the judges must take an oath, or make a solemn affirmation before the Administrative Council, to discharge their duties impartially and conscientiously.

14. The Court is composed of fifteen judges; nine judges constitute a quorum. A judge who is absent or prevented from sitting is replaced by the deputy judge.

15. The judges appointed by the following Contracting Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit. The judges and deputy judges appointed by the other Contracting Powers sit by rota as shown in the Table (*a*) annexed to the present Convention; their duties may be performed successively by the same person. The same judge may be appointed by several of the said Powers.

16. If a belligerent Power has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other belligerent.

(*a*) For this Table, see Parl. Papers, Misc. No. 6 (1908), p. 116; Pearce Higgins, 130. See also p. 197, *supra*.

17. No judge may sit who has been a party, in any way whatever, to the sentence pronounced by the national Courts, or has taken part in the case as counsel or advocate for one of the parties. No judge or deputy judge may, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.

18. The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or the subject or citizen of which is a party, has the same right of appointment; if in applying this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

19. The Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

20. The judges of the International Prize Court are entitled to travelling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins per diem. These payments are included in the general expenses of the Court dealt with in Article 47, and are paid through the International Bureau established by the Convention of the 29th July, 1899. The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

21. The International Prize Court sits at The Hague and may not, except in circumstances beyond its control, be transferred elsewhere without the consent of the belligerents.

22. The Administrative Council fulfils the same functions with regard to the International Prize Court as with regard to the Permanent Court of Arbitration, but only representatives of Contracting Powers shall be members of it.

23. The International Bureau acts as registry to the International Prize Court and shall place its offices and staff at the disposal of the Court. It has the custody of the archives and carries out the administrative work. The Secretary-General of the International Bureau acts as registrar. The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

24. The Court determines which language it shall use and the languages the employment of which shall be authorized before it. The official language, however, of the national Courts which have had cognizance of the case may always be employed before the Court.

25. Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

26. A private person concerned in a case will be represented before

the Court by an attorney, who must be either an advocate qualified to plead before a Court of Appeal or a High Court of one of the Contracting States, or a lawyer practising before a similar Court, or lastly, a professor of law at one of the higher teaching centres of those countries.

27. For the service of all notices, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on the territory of which the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence. Requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred. The Court is equally entitled to act through the Power within the territory of which it is meeting. Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

Part III. Procedure.

[Arts. 28–50 omitted; see p. 198, *supra*.]

Part IV. Final Provisions.

51. The present Convention does not apply as of right except when the belligerent Powers are all parties to the Convention. It is further understood that an appeal to the International Prize Court can only be brought by a Contracting Power or the subject or citizen of a Contracting Power. An appeal is only admitted under Article 5 when both the owner and the person entitled to represent him are equally Contracting Powers or the subjects or citizens of Contracting Powers.

52. The present Convention shall be ratified and the ratifications shall be deposited at The Hague as soon as all the Powers mentioned in Article 15 and in the Table annexed are in a position to do so. The deposit of the ratifications shall take place, in any case, on the 30th June, 1909, if the Powers which are ready to ratify furnish nine judges and nine deputy judges to the Court, duly qualified to constitute a Court. If not, the deposit shall be postponed until this condition is fulfilled. A minute of the deposit of the ratifications shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to each of the Powers referred to in the first paragraph.

53. The Powers referred to in Article 15 and in the Table annexed are entitled to sign the present Convention up to the date of the deposit of the ratifications contemplated in paragraph 2 of the preceding Article. After this deposit, they can at any time accede to it, purely and simply. A Power wishing to accede notifies its intention

in writing to the Netherland Government, transmitting to it at the same time the act of accession, which shall be deposited in the archives of the said Government. The latter shall send, through the diplomatic channel, a certified copy of the notification and of the act of accession to all the Powers referred to in the preceding paragraph, informing them of the date on which it has received the notification.

54. The present Convention shall come into force six months from the deposit of the ratifications contemplated in Article 52, paragraphs 1 and 2. The accessions shall take effect sixty days after the notification of such accession has been received by the Netherland Government, or as soon as possible on the expiry of the period contemplated in the preceding paragraph. The International Court shall, however, have jurisdiction to deal with prize cases decided by the National Courts at any time after the deposit of the ratifications or of the receipt of the notification of the accessions. In such cases, the period fixed in Article 28, paragraph 2, shall only be reckoned from the date when the Convention comes into force as regards a Power which has ratified or acceded.

55. The present Convention shall endure for twelve years from the date at which it comes into force, as determined by Article 54, paragraph 1, even for the Powers acceding to it subsequently. It shall be renewed tacitly for successive periods of six years unless denounced. Denunciation must be notified in writing, one year at least before the expiry of each of the periods mentioned in the two preceding paragraphs, to the Netherland Government, which will inform all the other Contracting Powers. The denunciation shall only operate in respect of the notifying Power. The Convention shall remain in force in the case of the other Contracting Powers, provided that their share in the appointment of judges be still sufficient to allow the work of the Court to be discharged by nine judges and nine deputy judges.

56. In case the present Convention is not in operation as regards all the Powers referred to in Article 15 and the annexed Table, the Administrative Council shall draw up a list on the lines of that Article and Table of the judges and deputy judges through whom the Contracting Powers are to share in the composition of the Court. The times allotted by the said Table to judges who are summoned to sit in rota shall be redistributed between the different years of the six-year period in such a way that, as far as possible, the number of the judges of the Court in each year shall be the same. If the number of deputy judges is greater than that of the judges, the number of the latter can be completed by deputy judges chosen by lot among those Powers which do not nominate a judge. The list drawn up in this way by the Administrative Council shall be notified to the Contracting Powers. It shall be revised when the number of these Powers is modified as the result of accessions or denunciations. The change resulting from an accession is not made until the 1st January after the date on which the accession takes effect, unless

the acceding Power is a belligerent Power, in which case it can demand to be at once represented in the Court, the provision of Article 16 being, moreover, applicable if necessary. When the total number of judges is less than eleven, seven judges form a quorum.

57. Two years before the expiry of each period referred to in paragraphs 1 and 2 of Article 55, any Contracting Power may demand a modification of the provisions of Article 15 and of the annexed Table, as regards its participation in the composition of the Court. The demand shall be addressed to the Administrative Council, which will examine it and submit to all the Powers proposals as to the measures to be adopted. The Powers shall inform the Administrative Council of their decision with the least possible delay. The result shall be communicated at once, and one year and thirty days at least before the expiry of the said period of two years, to the Power which made the demand. In such circumstances, the modifications adopted by the Powers shall come into force from the commencement of the fresh period.

No. XI.

HAGUE CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN MARITIME WAR, No. 13 of 1907 (*a*).

1. BELLIGERENTS are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

2. Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

3. When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not within the jurisdiction of the neutral Power, the captor Government, on the demand of the neutral Power, must liberate the prize with its officers and crew.

4. A Prize Court cannot be established by a belligerent on neutral territory or on a vessel in neutral waters.

5. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries; and in particular they may not erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

6. The supply, in any manner, directly or indirectly, of warships, supplies, or war material of any kind whatever, by a neutral Power to a belligerent Power, is forbidden.

7. A neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet.

8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel

(*a*) See n. (*a*), p. 489, *supra*.

intended to cruise, or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war.

9. A neutral Power must apply to the two belligerents impartially the conditions, restrictions, or prohibitions issued by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent warships or of their prizes. Nevertheless, a neutral Power may forbid any particular belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

10. The neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents.

11. A neutral Power may allow belligerent warships to employ its licensed pilots.

12. In default of special provisions to the contrary in the legislation of a neutral Power, belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

13. If a Power which has received notice of the outbreak of hostilities learns that a belligerent warship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local law.

14. A belligerent warship may not prolong its stay in a neutral port beyond the time permitted except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end. The regulations as to the length of time which such vessels may remain in neutral ports, roadsteads, or waters, do not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes.

15. In default of special provisions to the contrary in the legislation of a neutral Power, the maximum number of warships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.

16. When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other. The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible. A belligerent warship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

17. In neutral ports and roadsteads belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatever to their fighting force. The local authorities of the neutral Power shall decide what

repairs are necessary, and these must be carried out with the least possible delay.

18. Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

19. Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard. Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, in neutral countries which have adopted this method of determining the amount of fuel to be supplied. If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours.

20. Belligerent warships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.

21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

22. A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a Prize Court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

24. If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures. When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained. The officers and crew so detained may be left in the ship or kept either on another vessel or on land, and may be subjected to such restrictions as it may appear necessary to impose upon them. A sufficient number of men must, however, be always left on board for looking after the vessel. The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

25. A neutral Power is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.

26. The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the Articles relating thereto.

27. The Contracting Powers shall communicate to each other in due course all statutes, orders, and other enactments defining in their respective countries the situation of belligerent warships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other Contracting Powers.

28. The provisions of the present Convention do not apply except to the Contracting Powers, and then only if all the belligerents are parties to the Convention.

No. XII.

HAGUE DECLARATION PROHIBITING THE DISCHARGE OF PROJECTILES AND EXPLOSIVES FROM BALLOONS, No. 1 of 1907 (*a*).

The Contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

The present Declaration is only binding on the Contracting Powers in case of war between two or more of them.

It shall cease to be binding from the moment when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power.

In the event of one of the High Contracting Parties denouncing the present Declaration, such denunciation shall only operate on the expiry of one year after the notification made in writing to the Netherland Government, and forthwith communicated by it to all the other Contracting Powers.

This denunciation shall only operate in respect of the denouncing Power.

(*a*) See n. (*a*), p. 489, *supra*.

No. XIII.

THE DECLARATION OF LONDON, 1909.

DECLARATION CONCERNING THE LAWS OF NAVAL WAR.

PRELIMINARY PROVISION (*b*).

THE Signatory Powers are agreed that the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law.

CHAPTER I. BLOCKADE IN TIME OF WAR.

1. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

2. In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.

3. The question whether a blockade is effective is a question of fact.

4. A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.

5. A blockade must be applied impartially to the ships of all nations.

6. The commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port.

7. In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

8. A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

9. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name. It specifies—(1) the date when the blockade begins; (2) the geographical limits of the coastline under blockade; (3) the period within which neutral vessels may come out.

10. If the operations of the blockading Power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with Article 9 (1) and (2), must be inserted

(*b*) Formal parts omitted.

in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

11. A declaration of blockade is notified—(1) to neutral Powers, by the blockading Power by means of a communication addressed to the Governments direct, or to their representatives accredited to it; (2) to the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.

12. The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.

13. The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11.

14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

16. If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour, and the geographical position of the vessel at the time. If through the negligence of the officer commanding the blockading force no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.

17. Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective.

18. The blockading forces must not bar access to neutral ports or coasts.

19. Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.

20. A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that

at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

CHAPTER II. CONTRABAND OF WAR

22. The following articles may, without notice, be treated as contraband of war, under the name of absolute contraband: (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts. (2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts. (3) Powder and explosives specially prepared for use in war. (4) Gun-mountings, limber boxes, limbers, military waggons, field forges, and their distinctive component parts. (5) Clothing and equipment of a distinctively military character. (6) All kinds of harness of a distinctively military character. (7) Saddle, draught, and pack animals suitable for use in war. (8) Articles of camp equipment, and their distinctive component parts. (9) Armour plates. (10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war. (11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

23. Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified. Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.

24. The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband: (1) Foodstuffs. (2) Forage and grain, suitable for feeding animals. (3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war. (4) Gold and silver in coin or bullion; paper money. (5) Vehicles of all kinds available for use in war, and their component parts. (6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts. (7) Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs, and telephones. (8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines. (9) Fuel; lubricants. (10) Powder and explosives not specially prepared for use in war. (11) Barbed wire and implements for fixing and cutting the same. (12) Horseshoes and shoeing materials. (13) Harness and saddlery. (14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

25. Articles susceptible of use in war as well as for purposes of peace other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which

must be notified in the manner provided for in the second paragraph of Article 23.

26. If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

27. Articles which are not susceptible of use in war may not be declared contraband of war.

28. The following may not be declared contraband of war:—(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same. (2) Oil seeds and nuts; copra. (3) Rubber, resins, gums, and lacs; hops. (4) Raw hides and horns, bones, and ivory. (5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes. (6) Metallic ores. (7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles. (8) Chinaware and glass. (9) Paper and paper-making materials. (10) Soap, paint and colours, including articles exclusively used in their manufacture, and varnish. (11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper. (12) Agricultural, mining, textile, and printing machinery. (13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral. (14) Clocks and watches, other than chronometers. (15) Fashion and fancy goods. (16) Feathers of all kinds, hairs, and bristles. (17) Articles of household furniture and decoration; office furniture and requisites.

29. Likewise the following may not be treated as contraband of war:—(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30. (2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land.

31. Proof of the destination specified in Article 30 is complete in the following cases: (1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy. (2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

32. Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless

she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

33. Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

34. The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband. In cases where the above presumptions do not arise, the destination is presumed to be innocent. The presumptions set up by this Article may be rebutted.

35. Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port. The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

36. Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard.

37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

38. A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

39. Contraband goods are liable to condemnation.

40. A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

41. If a vessel carrying contraband is released, the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Court and the custody of the ship and cargo during the proceedings shall be borne by the ship.

42. Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.

43. If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband. A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

44. A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship. The delivery of the contraband must be entered by the captor on the logbook of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers. The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

CHAPTER III.—UNNEUTRAL SERVICE.

45. A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband: (1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy. (2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy. In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation. The provisions of the present Article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently

to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.

46. A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel (1) if she takes a direct part in the hostilities; (2) if she is under the orders or control of an agent placed on board by the enemy Government; (3) if she is in the exclusive employment of the enemy Government; (4) if she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy. In the cases covered by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation.

47. Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel.

CHAPTER IV. DESTRUCTION OF NEUTRAL PRIZES.

48. A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

49. As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

50. Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

51. A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.

52. If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

53. If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

54. The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the logbook of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage. The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

CHAPTER V.—TRANSFER TO A NEUTRAL FLAG.

55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted. Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

56. The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There, however, is an absolute presumption that a transfer is void:—(1) If the transfer has been made during a voyage or in a blockaded port. (2) If a right to repurchase or recover the vessel is reserved to the vendor. (3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

CHAPTER VI. ENEMY CHARACTER.

57. Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule.

58. The neutral or enemy character of goods found on board an

enemy vessel is determined by the neutral or enemy character of the owner.

59. In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

60. Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded. If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

CHAPTER VII. CONVOY.

61. Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search.

62. If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

CHAPTER VIII. RESISTANCE AND SEARCH.

63. Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

CHAPTER IX. COMPENSATION.

64. If the capture of a vessel or of goods is not upheld by the Prize Court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

FINAL PROVISIONS.

65. The provisions of the present Declaration must be treated as [illegible] and cannot be separated.

66. The Signatory Powers undertake to insure the mutual obs[illegible]

ance of the rules contained in the present Declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their Prize Courts.

67. The present Declaration shall be ratified as soon as possible. The ratifications shall be deposited in London. The first deposit of ratifications shall be recorded in a Protocol signed by the Representatives of the Powers taking part therein, and by His Britannic Majesty's Principal Secretary of State for Foreign Affairs. The subsequent deposits of ratifications shall be made by means of a written notification addressed to the British Government, and accompanied by the instrument of ratification. A duly certified copy of the Protocol relating to the first deposit of ratifications, and of the notifications mentioned in the preceding paragraph as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the Signatory Powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

68. The present Declaration shall take effect, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the Protocol recording such deposit, and, in the case of the Powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

69. In the event of one of the Signatory Powers wishing to denounce the present Declaration, such denunciation can only be made to take effect at the end of a period of twelve years, beginning sixty days after the first deposit of ratifications, and, after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years. Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other Powers. It will only operate in respect of the denouncing Power.

70. The Powers represented at the London Naval Conference attach particular importance to the general recognition of the rules which they have adopted, and therefore express the hope that the Powers which were not represented there will accede to the present Declaration. They request the British Government to invite them to do so. A Power which desires to accede shall notify its intention in writing to the British Government, and transmit simultaneously the act of accession, which will be deposited in the archives of the said Government. The said Government shall forthwith transmit to all the other Powers a duly certified copy of the notification, together with the act of accession, and communicate the date on which such notification was received. The accession takes effect sixty days after such date. In respect of all matters concerning this

Declaration, acceding Powers shall be on the same footing as the Signatory Powers.

71. The present Declaration, which bears the date of the 26th February, 1909, may be signed in London up till the 30th June, 1909, by the Plenipotentiaries of the Powers represented at the Naval Conference. In faith whereof the Plenipotentiaries have signed the present Declaration, and have thereto affixed their seals. Done at London, the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall remain deposited in the archives of the British Government, and of which duly certified copies shall be sent through the diplomatic channel to the Powers represented at the Naval Conference.

No. XIV.

TABLE OF SIGNATURES, RATIFICATIONS, AND ADHESIONS, WITH LIST OF RESERVATIONS APPENDED.

TABLE OF THE STATES REPRESENTED AT THE SECOND INTERNATIONAL PEACE CONFERENCE, WHICH HAVE *SIGNED*, *RECTIFIED*, OR *ADHERED* TO THE CONVENTIONS, DECLARATION AND FINAL ACT (*a*).

S = Signed. R = Ratified. A = Adhesion. x = With reservations.

STATES / Conventions, &c., relating to:	I. The Pacific Settlement of International Disputes.	II. The Employment of Force for Recovery of Contract Debts.	III. The Opening of Hostilities.	IV. The Laws and Customs of War on Land.	V. The Rights and Duties of Neutral Powers in War on Land.	VI. The Status of Enemy Merchant Ships on the Outbreak of Hostilities.	VII. The Conversion of Merchant Ships into Warships.	VIII. The Laying of Submarine Contact Mines.	IX. Bombardment by Naval Forces in Time of War.	X. The Adaptation of the principles of the Geneva Convention to Maritime War.	XI. Restrictions on the exercise of the Right of Capture in Maritime War.	XII. The Establishment of the International Prize Court.	XIII. The Rights and Duties of Neutral Powers in Maritime War.	XIV. Declaration prohibiting the discharge of Projectiles and Explosives from Balloons.	XV. Final Act.
Germany. R. 27 Nov. 1909	R	R	R	R x	R	R x	R	R x	R x	R	R	S	R x		S
America (United States of). R. 27 Nov. 1909; A. 3 Dec. 1909.	R x	R x	R	R	R			R	R	R	R	S	A x	R	S
Argentina	S	S x	S	S	S x	S	S	S	S	S	S	S	S	S	S
Austria-Hungary. R. 27 Nov. 1909	R	R	R	R x	R	R	R	R	R	R	R	S	R	S	S
Belgium. R. 8 Aug. 1910	R		R	R	R	R	R	R	R	R	R	S	R	S	S
Bolivia. R. 27 Nov. 1909	R	S x	R	R	R	S	S	S	R	R	R	S	R	R	S
Brazil	S x		S	S	S	S	S	S	R	R	S	S	S	R	S
Bulgaria	S x	S	S	S	S	S	S	S	S	S	S	S	S	S	S
Chile	S x	S	S	S	S	S	S	S	S x	S	S	S	S	S	S
China. R. 27 Nov. 1909; A. 15 Jan. 1910	R	A	A								S x	S	S		S

Cuba. R. 22 Feb. 1912	R	S	S	R	R	R	S	S	R	R	S	S x		S	S
Denmark. R. 27 Nov. 1909	R	R	R	R	R	R	R	R	R	R	R	S	R		S
Dominican Republic	S	S x	S	S	S	S		S x	S	S	S	—	S x	S	S
Ecuador	S	S x	S	S	S	S	S	S	S	S	S	S x	S	S	S
Spain	S	S	S	—	S	S	S	—	—	S	S	S		—	S
France. R. 7 Oct. 1910	R	R	R	R	R	R	R	R x	R x	R	R	S	R		S
Great Britain. R. 27 Nov. 1909	S	R	R	R	S x	R	R	R x	R x	S x	R	S	S x	R	S
Greece	S x	S x	S	S	S	S	S	S	S	S	S	—	S	S	S
Guatemala. R. 15 Mar. 1911	R	R x	R	R	R	R	R	R	R	R	R	S x	R		S
Hayti. R. 2 Feb. 1910	R	R	R	R	R	R	R	R	R	R	R	S x	R	R	S
Italy	S	S	S	S	S	S	S	S	S	S	S	S	S	—	S
Japan. R. 1 Dec. 1911	R x	R	R	R x	R	R	R	R	R x	R	R	S	R x		S
Luxemburg. R. 5 Sept. 1912	R		R	R	R	R	R	R	R	R	R		R	R	S
Mexico. R. 27 Nov. 1909	R	R	R	R	R	R	R	R	R	R	R	S	R		S
Montenegro	S	S	S	S x	S	S	S	—	S	S	—	—	S	—	S
Nicaragua. A. 16 Dec. 1909	A	A x	A	A	A	A	A	A	A	A	A		A	A	S
Norway. R. 15 Sept. 1910	R	R	R	R	R	R	R	R	R	R	R	S	R	R	S
Panama. R. 11 Sept. 1911	R	R	R	R	R	R	R	R	R	R	R	S	R	R	S
Paraguay	S	S	S	S	S	S	S	S	S	S	S	S	S		
Netherlands. R. 27 Nov. 1909	R	R	R	R	R	R	R	R	R	R	R	S	R	R	S
Peru	S	S x	S	S	S	S	S	S	S	S	S	S	S	S	S
Persia	S	S	S	S	S	S	S	S	S	S x	S	S x	S x	S	S
Portugal. R. 13 Apr. 1911	R	R	R	R	R	R	R		R	R	R	S	R	R	S
Roumania. R. 1 Mar. 1912	R x	-	R	R	R	R	R	R	R	R	R		R		S
Russia. R. 27 Nov. 1909	R	R	R	R x	R	R x	R		R	R	—		R		S
Salvador. R. 27 Nov. 1909	R	R x	R	R	R	R	R	R	R	R	R	S x	R	R	S
Servia	S	S	S	S	S	S	S	S	S	S	S	—	S		S
Siam. R. 12 Mar. 1910	R	-	R	R	R	R	R	R x	R	R	R	S x	R x	R	S
Sweden. R. 27 Nov. 1910; and, as regards x, 13 July, 1911	R		R	R	R	R	R	—	R	R	R	S	R	-	S
Switzerland. R. 12 May, 1910	R x		R	R	R	R	R	R	R	R	R	—	R	R	S x
Turkey	S x	S	S	S x	S	S	S x	S x	S	S x	S	S x	S x	S	S
Uruguay	S	S x	S	S	S	S	-	S	S	S	S	S x	S	S	S
Venezuela	S		S	S	S	S	S	S	S	S	S	—	S	-	S

a) This Table for which the author is indebted to the Secretary General of the Permanent Court—comprises all ratifications, &c. down to the end of September, 1912.

b) Names in alphabetical order, under French designation.

RESERVATIONS.

NOTE. For Reservations made on Signature, see vol. i., App. II., pp. 354 *et seq.*

Convention.	Powers.	Reservations on Ratification or Adhesion.
I.	America	"That the United States approves this Convention with the understanding that recourse to the Permanent Court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in Art. 53 of the said Convention to exclude the formulation of the *compromis* by the Permanent Court, and hereby excludes from the competence of the Permanent Court the power to frame the *compromis* required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States; and further expressly declares that the *compromis* required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise."
	Japan	Reservations on signature maintained in Act of Ratification.
	Roumania	Reservations on signature maintained in Act of Ratification.
	Switzerland	Reservations on signature maintained in Act of Ratification.
II.	America	That the United States approves this Convention with the understanding that recourse to the Permanent Court for the settlement of the differences referred to in the said Convention can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute.

RESERVATIONS *continued.*

Convention.	Powers.	Reservations on Ratification or Adhesion.
	Guatemala	Reservations on signature maintained in Act of Ratification.
	Nicaragua	By Act of Adhesion- 1 As regards debts arising out of ordinary contracts between the subjects of one State and a foreign Government recourse shall not be had to arbitration except in the specific case of a denial of justice by the Courts of the country of the contract, which ought first to be resorted to. 2 Public loans, with issue of bonds, constituting national debts cannot under any circumstances justify military aggression or the effective occupation of the territory of American States.
	Salvador	Reservation on signature maintained in Act of Ratification.
IV.	Germany	Reservation on signature maintained in Act of Ratification.
	Austria-Hungary	Reservation on signature maintained in Act of Ratification.
	Japan	Reservation on signature maintained in Act of Ratification.
	Russia	Reservations on signature maintained in Act of Ratification.
VI.	Germany	Reservations on signature maintained in Act of Ratification.
	Russia	Reservations on signature maintained in Act of Ratification.
VIII.	Germany	Reservation on signature maintained in Act of Ratification.
	France	Reservation on signature maintained in Act of Ratification.
	Great Britain	Reservation on signature maintained in Act of Ratification.
	Siam	Reservation on signature maintained in Act of Ratification.
IX.	Germany	Reservation on signature maintained in Act of Ratification.
	France	Reservation on signature maintained in Act of Ratification.
	Great Britain	Reservation on signature maintained in Act of Ratification.

RESERVATIONS—*continued.*

Convention.	Powers.	Reservations on Ratification or Adhesion.
	Japan	Reservation on signature maintained in Act of Ratification.
X.	China	Reservation on signature maintained in Act of Ratification.
XIII.	Germany	Reservations on signature maintained in Act of Ratification.
	America	By Act of Adhesion—That the United States adheres to the said Convention, subject to the reservation and exclusion of Art. 23; and with the understanding that the last clause of Art. 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.
	China	By Act of Adhesion—With the reservation of Art. 17, par. 2; Art. 19, par. 3; and of Art. 27.
	Japan	Reservations on signature maintained in Act of Ratification.
	Siam	Reservation on signature maintained in Act of Ratification.

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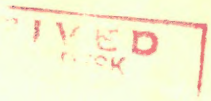

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